

ELECTION CASES INDIA & BURMA

1920—1935

By Sir Laurie Hammond,

K.C.S.J., C.B.E.

Chairman, Delimitation Committee, 1935-36

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PREFACE

In the United Kingdom election petitions except perhaps for a recount, are a product of the past, and those recorded in the volumes of *O'Malley and Hardcastle* provide a complete *corpus* of election law. No candidate, no election agent would dare to depart from this well defined track of precedent.

The same, doubtless, will eventually be the case in India and Burma. But for many years to come there will still have to be election inquiries. The CORRUPT PRACTICES AND ELECTION PETITIONS ORDER of 1936, and the Governors' Rules will require judicial interpretation. For example, opinions may differ as to what is meant by 'customary hospitality'. The imposition of a maximum on election expenditure may lead to the return of election expenses being more frequently challenged. The large number of cases dealing with the publication of false statements or the use of spiritual intimidation, have not yet achieved finality in the enunciation of juridical principles. Lastly with an electorate of some thirty-five millions, there may, despite the remarkable organizing capacity of the Civil Services, be mishaps or irregularities which may, or may not, 'materially affect' the result of the election.

The CORRUPT PRACTICES ORDER, 1936 and the Governors' Rules should remove some of the difficulties experienced in the past, as they have adopted some of the amendments suggested in the reports. A candidate can now only claim the seat on the ground that he would have obtained a majority of valid votes. The employment of an agent, disqualified for corrupt practices will avoid the election. If a person votes twice at the same election, not being entitled so to do, all his votes will be rejected. These are all points discussed in the cases published in this volume.

The selection of cases has not been easy. Some have been retained to shew the Returning Officer what he should not do. Others may be of assistance to an Election Tribunal in shewing the standard of evidence necessary, or the principles to be observed in allocating costs. From others the candidate may derive advice regarding procedure, as for example in the identification of voters, or in drawing the attention of Presiding Officers to any corrupt practice or irregularity.

In the Appendices the Reader will find the Corrupt Practices Order based on the rules under the Government of India Act with such amendments as were found necessary. Appendix II gives the leading case of *Woodward v. Sarsons* which everyone connected with elections should read, both as regards theory and practice.

It is not customary to dedicate a book containing reports of law cases, but I would like to associate with this volume the names of SIR VENTAKA SUBHA RAO of the Madras High Court, and Mr. DIN MUHAMMAD of the Punjab High Court, my colleagues on the Indian Delimitation Committee. During the cold weather of 1935-36 we visited every Province in India, and apart from recorded evidence, met many members of the various Legislatures and many who had been candidates. From conversations, formal and informal, we learnt much of the difficulties which attend an election of India, and also of the efforts, proper and improper, made to bring India's electoral law into harmony with the customs and desires of the electorate.

Editing this book brought back an echo of our pleasant and interesting discussions.

LAURIE HAMMOND.

Blue Haze,

Walmer.

September 28th, 1936.

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ELECTION CASES

INDIA & BURMA

1920—1935

CASE No. I

Agra City (N.-M.U.) 1925

L. BUDDHI MAL *Petitioner,*

versus

SETH ACHAL SINGH
and afterwards

RAM SAHAI *Respondent.*

Evidence necessary to prove personation discussed. Election agent should only identify voters whom he personally knows.

An election is void if agent of candidate abets or connives at personation. (Para 3 of part I of first schedule to Corrupt Practices Order, 1936.)

The publication of a false statement calculated to prejudice the prospects of a candidate's election must relate to the personal conduct and character of the candidate. (Para 5 of part I of first schedule, Corrupt Practices Order, 1936.)

The issue of an erroneous statement as to the number of votes recorded for the respective candidates during the progress of the poll does not necessarily amount to undue influence; there must be proof that the statement is reasonably calculated to prejudice the prospects of the candidate's election.

A "party candidate" is responsible for the acts done by that party's agency.

Validity of votes at a recount examined.

THERE were three candidates and the result was announced as follows :—

			<i>Votes.</i>
Seth Achal Singh	..	..	1,431
Babu Kishan Lal	..	..	1,421
Babu Prag Narain	..	..	1,193

Subsequently there was a recount and various voting papers were examined by the Commissioners according to whose decision Seth Achal Singh obtained 1,430 votes and Babu Kishan Lal 1,425. The appendices to the report give the reasons for the decision accepting or rejecting the various ballot-papers.

The petitioner alleged definite acts of personation, while four leaflets alleged to be published by the respondent were impugned as containing false statements about the character of the other candidate Babu Kishan Lal, or amounting to undue influence reasonably calculated to prejudice the prospects of Babu Kishan Lal's election.

Six cases of personation were alleged by the petitioner.

(a) Piare, son of Nathu, Chamar, of Tila Ajmeri Khan, voter no. 416 in Rikabganj ward.

It was proved by Naib Ali, head mortuary clerk of the municipal board office, that the register of deaths shows that Piare Lal, son of Nathu, Chamar, of Tila Ajmeri Khan in the Rikabganj circle, died on January 4, 1925. The evidence of death was confirmed by four other witnesses who stated "that the man who died was the man on the electoral roll". It is not contested by the defence that this voter was dead at the time of election. Jai Narain Singh, states that he was polling agent of Seth Achal Singh at this polling station and that he signed exhibit 10 as identifying the person who voted as Piare Lal, and that he had no personal knowledge of this voter before. He says that he came to vote and gave his name and on his mere statement the witness identified him. The only steps he took to inquire into the matter were to ask the office clerks the name and parentage of the voter; that is, he asked what was entered on the roll.

The defence does not deny that Jagannath committed personation. It is contended that one Liaqat, son of Chutta Qasai, a supporter of B. Kishan Lal, took Jagannath to the polling station. This Liaqat has not been produced by the defence. This evidence does not appear to be true, because Jagannath voted for Seth Achal Singh and not for B. Kishan Lal, and he was identified by the polling agent of Seth Achal Singh.

The fact is undisputed that Jagannath committed personation and that he was identified by the polling agent of Seth Achal Singh. The defence put forward a case that Jagannath had brought his water rate

receipts to the polling station and had shown them to the officer. The suggestion that Jagannath showed anyone at the polling station his water rate receipts appears to have been invented by the defence at a later date.

(b) Tika, son of Ratan Lal, Chamar of Haveli, Bahadur Khan, voter no. 2048, Chatta ward, polling station Parmath ki Kothi.

The witness for both sides agree that this man died some years ago and was not alive at the time of election. Beni, son of Tika, gave evidence which was hostile to the petitioner and represented at first that his father was living at the time of election, but was away on business. When cross-examined by the petitioner with the leave of the court, however, he admitted that his father died $2\frac{1}{2}$ years ago. He said that a man of Seth Jaswant Rai, brother of Seth Achal Singh, told him that a son could vote for his father. He voted for Seth Achal Singh and he represents that he did not know whether he was voting for himself or his father. He says he gave his father's name and his grandfather's name. When shown the signature slip he admitted that the name on it is his father's name and was written by him. The signature slip bears the letters TIK in Hindi and the identifying witness was H. R. Gupta. Beni has also said that Seth Achal Singh's man identified him at the polling station as Tika. Ram Singh, stated that Hari Ram Gupta identified Beni. The Commissioners had some difficulty in securing the attendance of Hari Ram Gupta and he only appeared after a warrant had been issued. He admitted that he signed the signature slip for Tika and that he did not know the voter before identifying him. He said that, when he did not know a voter personally, he verified his name, etc., from the clerk and saw that they tallied with the list, meaning apparently the electoral roll. This, of course, was no confirmation of the fact that the man was giving a correct name. The defence points out that Beni himself is on the roll as no. 566, Chatta ward (Beni, son of Tika, Chamar, shoe-maker of Belanganj). The roll is not marked in token of the fact that this person voted. Schedule V, part I, rule¹ 3 of the election rules defines personation as "the application by a person for a voting paper in the name of any other person, whether living or dead". It is clear from this definition that it is immaterial whether the name of Beni was or was not on the register. He applied for a voting paper in the name of another person and therefore he committed personation. Reference was made to *Bareilly City* case (see page 142), where the Commissioners held that there was a mistake by a voter who voted for another voter of the same name and that he was not guilty of personation. But the present case is entirely different because Beni did not vote in his own

¹ Now section 3 of part I of the first schedule of the Corrupt Practices and Election Petitions Order, 1936.

name, but in that of his father. Clearly therefore Beni committed personation. Hari Ram Gupta was the polling agent of Seth Achal Singh.

(c) Chidda Ram, son of Jasram, Chamar of Qazipara, voter no. 506, Rikabganj ward.

The vote for this person was first taken by means of a signature slip which bears a thumb mark and is signed by the polling agent of Seth Achal Singh in this ward, namely Srilal, Khazanchi, who has died since the election. Subsequently Chidda Ram, son of Jasram, Chamar, of Qazipara, came to vote and gave another signature slip which was signed by him and was also attested by Srilal, Khazanchi. As a person had already voted for no. 506, the vote was taken by means of a tendered vote. Both votes were for Seth Achal Singh, but only one was counted. The defence is that Chidda Ram, son of Jasram, was not the voter meant for no. 506, but that there was another Chidda Ram, son of Jasram, who voted correctly for that number, and consequently there was no personation. There are three defence witnesses, who claim to have known this other Chidda Ram, son of Jasram, and one of them claims that the other Chidda Ram rented a house from him. Only D.W., Debi Singh, says that this other Chidda Ram was a voter. The defence did not produce any Chidda Ram, son of Jasram, and the Commissioners do not believe that any such person existed. Moreover, if Chidda Ram was not the person intended by the electoral roll for no. 506, the polling agent for Seth Achal Singh should not have identified him.

Of the six cases of alleged personation the Commissioners were of opinion that these three were fully proved. "The persons who identified the men who voted in these three cases were all election agents of Seth Achal Singh. In the *Jaunpur* case (see page 422), it was held that an election agent should only make identification in cases where he has personal knowledge. This is in accordance with rule 21 of the regulations for election to the Legislative Council of the United Provinces which says that every signature or thumb-impression made by a voter shall be attested by any candidate or his representative who may be able to recognize the voter. Moreover, the meaning of the word 'attest' is that the person attesting should personally know the individual whom he attests. Reference was made by the defence to *Sheikhupura*¹ case, where it was held that an isolated case of personation may be due to the ignorance of a voter who may have attempted to have innocently voted by proxy, or may be due possibly to the machinations of a scheming rival candidate. The present case, however, stands on quite a different footing, as there are three cases of personation clearly proved, and in each case the person identifying was the election agent of Seth Achal Singh. Also the evidence in the *Sheikhupura* case was of much less value because the real voters

¹ I.E.P. II, 261.

alleged that they did vote and the alleged impersonators denied that they voted. In the present case two of the electors concerned were dead at the time of election. The two election agents who have been examined admit that they identified persons of whom they had no knowledge. The vakil for the respondent contends that this is a common practice. If so, it ought to be stopped. The vakil for defence claims that under ¹ election rule 44(2) it is not necessary for the Commissioners to find the election void, even though they find that the agent of the returned candidate has been guilty of a corrupt practice specified in part I of schedule V ; but the vakil has made two mistakes in reading the rule. Firstly, the rule only applies where the agent is not the election agent and secondly, where the corrupt practice is not bribery or the procuring or abetment of personation. The case therefore comes under the first part of the rule, sub-head (b) ; and under that provision the election of the returned candidate shall be void if the Commissioners consider that any corrupt practice such as is specified in part I, schedule V, has been committed. By identifying these three persons the election agents of Seth Achal Singh enabled them to obtain voting papers in the name of other persons. The election agents admit that they did not know the applicants personally. By identifying the applicants the election agents falsely represented that they did not ² know the applicants personally. The election agents therefore committed abetment of the personation and connived at it within the meaning of schedule V, part I, rule 3, and committed a corrupt practice. The Commissioners were therefore unanimously of opinion that the election of Seth Achal Singh was void because his election agents committed these three instances of corrupt practice under schedule V, part I. The other three instances are held not proved."

The Commissioners found that appendix no. I was printed on behalf of Seth Achal Singh and that it contained false statements about the character of Babu Kishan Lal. "The pamphlet was a cartoon headed : "This man has a place for himself neither in this world nor in the other". It is divided into three parts. The first part represents B. Kishan Lal, who is stated to be a "selfish candidate" asking for the votes of the trading class on the ground that he will try to improve trade. A seth and dalal replies : "O Lalaji go away by bearing post. Will you do the same kind of service that you did in the corner in yarn ? Thanks for your improvement of trade." There is a certain amount of evidence that in 1924 certain firms in which B. Kishan Lal was a partner made large purchases of yarn and the price of yarn rose in consequence. In the second part of the cartoon B. Kishan Lal is represented as asking for the

¹ Now paragraph 7(2) of part III of the Corrupt Practices Order in Council.

² This portion of the report is reproduced *verbatim* from the report published in the U.P. Gazette of 26th January, 1926. Presumably the word 'not' should be omitted.

votes of three poor persons who are so emaciated that they appear as mere skeletons. These persons are shown as replying "O Lalaji, you made a contract with Government for *ghi*, wheat and other things, and prices rose so much that we became skeletons from hunger. You merely pretend that you are going to serve us because you want our votes". There is evidence that the firms in which B. Kishan Lal is interested did take contracts for *ghi* and rice from Government, but there is no evidence that any contract was taken in wheat. There is some evidence for defence that the price of *ghi* rose, but the Commissioners are not satisfied that it rose on account of the contracts entered into by these firms. The Commissioners consider that the statement that the poor people of Agra were turned into skeletons by reason of B. Kishan Lal's *ghi* contract is a statement which is false to the knowledge of the person making it.

In the third part B. Kishan Lal is represented as appealing to a military officer to send him to the Council on the ground that he was an old contractor, and the military officer is represented as saying: "Go away; you are..." The vakil for defence says that the blank should be filled in by the words "Go away; you are a dismissed contractor". An attempt was made by the defence by issuing a commission to Major Scott in Naini Tal, D.A.D.S. and T., Eastern Command, to show that the firms in which B. Kishan Lal was interested were dismissed as contractors. The witness says that two of the firms had been contractors, but were not now on the list of the department. He was unable to state the reasons as the matter was strictly confidential.

It was argued by the defence that the statements were not about the personal character of B. Kishan Lal because they referred to the business of the firms of which he was a partner. The Commissioners were referred to *West Coast and Nilgiri's* case (see page 712), in which it was held that the statement that the petitioner voted with Government for the enhancement of the salt tax was not a statement in relation to the personal character and conduct of the petitioner. We agree with the interpretation placed on the words in this ruling, and we consider that schedule V, part I, rule 4,¹ refers to the personal character or conduct of a candidate as opposed to his public conduct as a public man in political life. The statement in the ruling refers to the action of the petitioner as an elected member of Council, which is, of course, in a public character. Rogers on Elections, volume II, 19th edition, page 560, quotes Darling, J., in *Cockermouth* (1901), 5 O'M. and H. 159: "It is not an offence to say something which may be severe about another person, nor which may be unjustifiable, nor which may be derogatory, unless it amounts to a false statement of fact in relation

¹ Now section 5, part I of first schedule of Corrupt Practices Order, 1936.

to the personal character or conduct of such candidate ; and I think the Act says that there is a great distinction to be drawn between a false statement of fact which affects the personal character or conduct of the candidate, and a false statement of fact which deals with the political position or reputation or action of the candidate. If that were not kept in mind this statute would simply have prohibited at election times all sorts of criticism which was not strictly true, even relating to the political behaviour and opinions of the candidate. That is why it carefully provides that the false statement, in order to be an illegal practice, must relate to the personal character and personal conduct. One can easily imagine this kind of thing. To say of a person that he was a fraudulent bankrupt would,¹ undoubtedly, be within the statute ”.

Rogers on page 558 states : “ In *Bayley v. Edmunds* and others (1895), 11 Times L.R. 537, the defendants had distributed a leaflet amongst the electors stating that the firm of which the plaintiff was a member had locked out their miners for six weeks until the price of coal reached 22s. or 23s. at the pits, and that then the plaintiff’s conscience would not allow him to starve the poor miners more. The Court of Appeal held that such statements were derogatory to the personal character of the plaintiff and came within the section, and granted an injunction.”

The statements in the cartoon in the present case are rather similar, that the firm of which the candidate was a member caused starvation to poor men. These statements in regard to the trading transactions of private firms cannot be taken to refer to the public acts of a public man. We consider, therefore, that the statements in the cartoon do refer to the personal character and conduct of B. Kishan Lal ; and we consider that the statements are false in the particulars which we have noted.

It has been held in the *Ballia* case (see page 117), that a candidate who does not take reasonable precautions to satisfy himself of the truth of the allegations made in a document is guilty of a corrupt practice, as defined by schedule V, part I, paragraph 4, and is, therefore, debarred from being elected.

The third part of this issue is : “ Were the statements reasonably calculated to prejudice the election of B. Kishan Lal ? ”

“ We consider that these statements would have that effect upon the prospects of B. Kishan Lal and there is evidence to that effect. We consider, therefore, that the election of Seth Achal Singh is void ² under rule 44 (1) (b) of the election rules on account of this corrupt practice, which comes under schedule V, part I.

¹ The actual wording of this passage is as follows : “ To say of a person that he was a fraudulent bankrupt, it would be necessary, probably, to give examples, but that sort of thing would, undoubtedly, be within the statute ”.

² Section 5, part I of first schedule of Corrupt Practices Order, 1936.

Another leaflet was a notice headed "Result of election up to 11 o'clock". At the bottom of the papers were words in English "rough guess", the rest of the pamphlet being in Hindi. This gives the total number of votes for Seth Achal Singh as 1,856, for B. Prag Narain as 1,425 and for B. Kishan Lal as 1,340. The figures for Seth Achal Singh are 400 more than he got at the close of the day, and there were 17 votes for Seth Achal Singh which were rejected by the returning officer as invalid. The representation that Seth Achal Singh had a majority of 500 votes over B. Kishan Lal at 11 o'clock is absolutely erroneous. There is evidence on one side that this depressed the followers and voters of B. Kishan Lal, and on the other side that it made the voters and followers of Seth Achal Singh slacken. Undue influence is defined in schedule V, part I, rule 2, as interference with the free exercise of any electoral right. In English cases this has been held to cover any fraudulent device or contrivance. In the *Stepney* case (1886) quoted by Rogers on Elections, 19th edition, volume II, page 520, a misleading card was sent to each voter, and Denman, J., held that "there must be proof that some elector or electors had been actually impeded or prevented before it can be held that the offence has been committed". Two witnesses do state that after seeing appendix II they refrained from voting and they would otherwise have voted for B. Kishan Lal, but the Commissioners consider this evidence insufficient.

On the second part of the issue, whether Seth Achal Singh published or caused to be published this notice, there are 13 witnesses for the petitioner who deposed that it was published on behalf of Seth Achal Singh, and there is no evidence for the defence that it was being distributed on behalf of any other candidate. We find, therefore, that Seth Achal Singh caused it to be published; but, as we have found that it did not amount to undue influence, our finding on this issue is in favour of the defence."

The third pamphlet issued by the president of the Swaraj party enjoined the voters to vote for Seth Achal Singh who was the candidate for the Swaraj party. It gave the names of the three candidates as:—

No. 1, Seth Achal Singh.

No. 2, Babu Kishan Lal.

No. 3, Babu Prag Narain.

In the gazette of April the 25th, 1925, and in the voting papers the order of the candidates was given as:—

No. 1, Seth Achal Singh.

No. 2, Babu Prag Narain.

No. 3, Babu Kishan Lal.

The pamphlet of the Swaraj party therefore reversed the order of the name of Babu Kishan Lal from the order in which they were given previously in the gazette.

It is represented by B. Jaspat Rai and by defence witnesses that after the election began they discovered the mistake which had been made, and the Swaraj party caused a proclamation to be made by beat of drum stating that the wrong order had been given in their pamphlet. The mere fact that publication by beat of drum was considered necessary is an admission that the pamphlet contained a false statement and that the statement was calculated to affect the prospects of the two candidates concerned. It has been argued that illiterate people would not be misled because they could ask the presiding officer ; but the rule leaves it optional with them to ask him or not. One witness, Amarnath, has stated that he had instructed some illiterate voters to vote according to appendix III, and some five or six told him later that they had voted wrongly. Two more also state that people were misled. It was argued that literate people would not be misled, but there are many people who can read just a few words with difficulty, and this class of voters might easily have been misled. It was argued that, as the president of the Swaraj party got the pamphlet printed, the candidate of that party would not be responsible. We consider that the candidate of a party is responsible for the acts done by that party's agency. B. Jaspat Rai says that he got this appendix printed at the Mahabir press and that Seth Achal Singh paid the expenses, a fact which Seth Achal Singh omitted to note in his return of expenses. Schedule V, part I, rule 4, makes it a corrupt practice to publish a false statement in relation to the candidature of any candidate, which statement is reasonably calculated to prejudice the prospects of such candidate's election. We consider that appendix III comes under this rule. Although the intention may not have been to deceive, still we consider that reasonable precautions were not taken, and liability, therefore, attaches to Seth Achal Singh, as held in the *Ballia* case (see page 113).

As regards the fourth pamphlet the Commissioners found that it did not bear on its face the true name and address of the printer and publisher. Therefore a corrupt practice had been committed under schedule V, part II, rule¹ 8. In view of the above findings the seat was declared vacant. The petitioner was allowed costs against Seth Achal Singh of Rs. 3,326-14-0 and as against Ram Sahai, who was substituted at a later date for the respondent—Rs. 888-8-0.

¹ Now section 3 of part III of first schedule of Corrupt Practices Order, 1936.

APPENDIX A.

Votes for KISHAN LALL rejected by the returning officer, which the Commissioners consider valid votes.

<i>Voting paper number.</i>	<i>Description.</i>
76/43	.. Has a mark / opposite Prag Narain and a mark X opposite Kishan Lal. Rogers on Elections, volume II, 19th edition, page 168, second and third figures, shows that similar ballot-papers in England have been held to be good votes for the candidate against whose name there is a X. This has been followed in the <i>Punjab North</i> case (see page 572), exhibit C-3.
17/13 ..	.. Has marks against all three candidates, that opposite Kishan Lal being a X, and those opposite the other two candidates being circular marks apparently obliterating crosses. Rogers, page 164, first figure, shows a ballot-paper which was held to be a good vote for the candidate against whose name there was a cross, "The other mark, in the space appropriated to Master, not being a cross, did not destroy the vote".
17/14 ..	.. Has two marks 45 which may be attempts to make a cross, or may be the Hindi numbers 45. Both marks were in the space opposite Kishan Lal. Rogers on page 158 bottom figure, 159 top figure, 162 top figure, 169 top figure, gives cases of marks which were not a cross which made a valid vote. It was suggested that the voter might be identified by the Hindi numbers 45, but this suggestion appears far-fetched.
37/9 ..	.. Has a cross opposite Kishan Lal, but a partial thumb mark also. This was probably caused by the voter having had ink on his left thumb when his impression was taken on the signature slip. It would be impossible to identify the voter by this, as an expert would have to compare the thumb-impressions of all the voters for this purpose. For these reasons it was held in the <i>Punjab North (M.)</i> case (see page 574), that eighteen such votes were valid.

APPENDIX B.

Vote for ACHAL SINGH rejected by the returning officer, which the Commissioners consider a valid vote.

<i>Voting paper number.</i>	<i>Description.</i>
26/34 ..	.. This has a X with the intersection in the space opposite Achal Singh, and part of the X extends into the space opposite Prag Narain. Rogers on Elections, volume II, 19th edition, page 155, top, refers to three cases where such ballot-papers were held valid votes for the candidate opposite whose name the intersection of the X appeared, and lower figure on page 161 and lower figure on page 167 illustrate this.

APPENDIX C.

Votes for KISHAN LALL, which the Commissioners consider that the returning officer rightly rejected.

<i>Voting paper number.</i>	<i>Description.</i>
76/33 ..	.. The X was below the compartments of all three candidates. This has been held to be a bad vote in Rogers on Elections, 19th edition, volume II, lower figure on page 170.
27 63 and 66/32	.. The cross is placed as above, but a small part of the X comes into the compartment of Kishan Lal, not the intersection. Following the above ruling in Rogers the votes are invalid.
30 35 ..	.. A mark ✓ partly opposite Prag Narain and partly opposite Kishan Lal. Invalid for uncertainty.
63/69 ..	.. Signature of voter in seraf, read as Madan Manuna. A signature is invalid under the election regulations.

APPENDIX D.

Votes for ACHAL SINGH, which the Commissioners consider that the returning officer rightly rejected.

<i>Voting paper number.</i>	<i>Description.</i>
29/12, 51/27, 27/62 ..	Rejected for a name being written. In the latter two cases the name of the candidate was written. Rogers on Elections, volume II, 19th edition, page 169, gives a case where this was held to invalidate a ballot-paper.
56/100, 73/55, 88/12, 62/97, 64/78.	The mark was above the name compartments of all the candidates. Rogers, page 170, gives a case where such marks were held to invalidate the ballot-paper.

APPENDIX E.

Votes which the Commissioners consider the returning officer rightly held valid.

*Voting paper
number.*

Description.

FOR ACHAL SINGH.

1/nil .. The presiding officer forgot to put the serial number and there is only the book number. Book no. 1 has 100 counterfoils. It is not shown that there were more than this number of outer foils marked book no. 1. Regulation 22 does not require a serial number on the outer foil, only on the counterfoils, and all counterfoils in book no. 1 are duly numbered.

FOR KISHAN LAL.

30, 14 .. There is a X opposite Kishan Lal. Objection was taken to a faint / opposite Achal Singh. This mark was not made in pencil, as the marks by voters are made, but with a pen. It appears to have been accidentally made by some one not the voter and cannot invalidate the vote.

CASE No. II
Agra City (1926)

LALA BABU LAL *Petitioner,*

versus

BABU PRAG NARAIN *Respondent.*

The following acts were held to amount to bribery :—

- (1) Creation, at instance of candidate when a municipal commissioner, of an additional seat in a ward.
- (2) Removal of a latrine at request of a supporter.
- (3) Improper payment of salary to a municipal employee.
- (4) Creation of new post by municipal board
- (5) Appointments on exhibition committee.
- (6) Subscription towards repairs of a temple by a candidate who was a follower of the Arya Samaj.
- (7) Remission of interest to a judgment-debtor.

A threat to disclose an improper letter amounts to undue influence

The instigation of filing a criminal case to prevent a man working as canvasser or agent is undue influence. Though it is not compulsory for a candidate to maintain accounts of his private expenditure their absence makes it impossible for the candidate to prove his election expenses.

CHARGES of bribery and undue influence were brought by the petitioner, a voter, Lala Babu Lal. The Commissioners found that in the municipal board of Agra, during the months of August and November 1926, there was great activity displayed by Babu Prag Narain's party consisting of eight members of the municipal board. The resolutions passed at the meetings held during those months "had the effect of ingratiating Babu Prag Narain with various electors and relations of electors". The specific instances proved were as follows :—

(a) One Babu Gopi Lal, vakil who had worked as polling agent of Babu Kishan Lal, the other candidate, at two previous elections also signed the nomination paper for Babu Kishan Lal filed on October the 20th. He had never before worked for the respondent Babu Prag Narain at any previous election—Council or municipal. On the day of the election, however, November the 26th, Babu Gopi Lal appeared as the polling agent of Babu Prag Narain, and the latter says that Babu Gopi Lal worked as canvasser also on November the 25th. It was proved that at a special meeting of the municipal board on October the 29th, 1926, without any notice to the members of the board, a resolution was passed to the effect that pending a general re-distribution of wards, the number of Lohamandi ward members be increased by one. Babu Gopi Lal had been a candidate several times in elections for Lohamandi ward but had always been defeated obtaining second place. "It is clear that Babu Prag Narain gained the point for Babu Gopi Lal." Apart from this bribery, it was held that undue influence was also proved against Babu Prag Narain in the case of Babu Gopi Lal under the following circumstances :—

"Babu Gopi Lal admits that on October 5, 1925, he wrote a letter to a Bench Magistrate in the following terms :—

'There is a case before you to-day in the Bench. Kundan vs. Kalimal. My voters are interested in the welfare of Kundan, complainant.—Gopi Lal, vakil, 5/10.'

A photograph of this letter is produced and Babu Gopi Lal is 'not prepared to deny that this is a photograph of my original' (exhibit 33). It is obvious that to write such a letter was professional misconduct on the part of the vakil, and a threat of disclosure would have a great influence on his conduct. Although naturally there is no direct evidence on the subject it is alleged that the letter was used in this way to induce Babu Gopi Lal to change his allegiance to the side of Babu Prag Narain."

Kanhaiya Lal started a cinema theatre close to a large covered masonry latrine in Hingkimandi, Kotwali ward and, in October, 1926 desired the removal of the latrine before he opened his theatre. The medical officer of health reported against the removal on October the 22nd. Three days later Babu Prag Narain gave notice of a resolution

for the removal of a public latrine and Kanhaiya Lal started collecting signatures for a petition written in his own handwriting which he sent to the board on October the 26th. At the meeting of October the 29th, it was resolved that the chairman should inspect and decide. On November the 4th the chairman recorded an order that the latrine should be removed and that the applicant should build an up-to-date standard latrine on a site to be selected by the vice-chairman, if necessary. The latrine was removed but not at the expense of Kanhaiya Lal and no new latrine was built by him. "It is obvious that Kanhaiya Lal has received a gratification in this matter on the resolution proposed by Babu Prag Narain."

The Commissioners considered that "it is proved that Kanhaiya Lal, theatre owner, received an illegal gratification on the resolution proposed by Babu Prag Narain which amounts to bribery".

Another charge of bribery related to the case of a water rate superintendent of the municipality, Babu Jey Behari Lal, whom the chairman tried to remove for inefficiency in 1925 and earlier. This man went on three months' leave and remained away for eighteen months without permission, receiving an order of dismissal from the executive officer on May 14, 1925. Eventually he canvassed all the members of the board and ten of them including five members of Babu Prag Narain's party and three members of Kishan Lal's party signed an application bringing the matter before the board. It appears that the board considered that the explanation of Jey Behari had not been taken, and eventually in the meeting of December 22, 1926, the board resolved "In view of his long service, and to put an end to the matter of Babu Jey Behari who resigns the service, his salary be paid. Babu Kishan Lal dissenting".

Out of fourteen members present there were seven of the party of Babu Prag Narain, including himself. Shiamlal says that Jey Behari Lal canvassed for Babu Prag Narain, but there is no other evidence of this, and Jey Behari Lal has no vote, though he admits that his brother has a vote. There is no doubt that the payment of eighteen months' full salary, Rs. 1,850-15-0, was contrary to the Civil Service Regulations, and the sanction of the Commissioner, which was necessary under the Act, was not asked. But the Commissioners are not satisfied that a case of bribery has been proved against Babu Prag Narain under this head.

Babu Ram Prashad Goel, vakil, intended to stand as a candidate at this election, but stated that he withdrew because Babu Prag Narain told him that this was the last time that he would stand, and that in a triangular contest he would have no chance, meaning that Babu Kishan Lal would get in. He withdrew, became a worker for Babu Prag Narain, canvassed for him and acted as his polling agent. His brother Dr. Kashinath Goel also worked for him and his father Babu Nath Mal issued literature for which he paid. The canvassing of the Goel family

for Babu Prag Narain was very successful. On the day after election, the municipal board appointed Dr. Kashinath Goel to the post of sanitary inspector on a salary of Rs. 75 and bicycle allowance, the resolution stating that a permanent hand was required for laboratory and school inspection. "The board therefore created a new post for which there was no provision in the budget . . . At that meeting out of eleven members six belonged to the party of Babu Prag Narain." The Commissioners considered that bribery was proved in this instance and that "the appointment of Dr. Kashinath Goel was a gratification to induce his brother, B. R. P. Goel, not to stand at the election".

. It was also held that the remission of interest in the case of Lala Lachmi Narain, who was a judgment-debtor of the board, for the price of land in Freeganj amounted to bribery. "There is no doubt that the finance sub-committee were very generous with the money of the board on this occasion, and there appears to have been no reason to excuse the interest which the court had decreed to the board. On August the 27th, 1926, at the meeting of the board it was resolved to remit only half the interest. But at the subsequent meeting on October the 29th in which the party of Babu Prag Narain had the majority a resolution was passed that the applicant having been given assurance before the deposit of Rs. 205 and having acted on that assurance, the amount be remitted." The examination of the ballot-paper showed that Lala Lakshmi Narain had voted for Babu Prag Narain.

At a meeting of the municipal board on October the 29th, 1926, at the instance of Babu Prag Narain, Lala Gulab Chand, Lala Gopal Kishan and Lala Kanhaiya Lal (the owner of the theatre, referred to above), were co-opted members of the exhibition committee. Lala Gulab Chand and Lala Kanhaiya Lal acted as polling agents for Babu Prag Narain and Babu Gopal Kishan checked lists of voters for him. "The value of being on an exhibition committee may not be great, though it may eventually involve the control of expenditure; the Commissioners considered that in this case there was a gratification given by Babu Prag Narain to vote for him."

"A payment of Rs. 150 was made by Babu Prag Narain through, it was alleged, one Seth Tara Chand, whom the defence did not produce to deny it, towards the repairs of a temple, the repairs to which were a matter of local interest to the inhabitants of mohalla Bhairon. The nephew of Babu Prag Narain paid Rs. 100 and Seth Tara Chand Rs. 200, making Rs. 450 out of the total amount collected of Rs. 753. "Babu Prag Narain admits that he is a follower of the Arya Samaj who do not believe in temples. Also the fact that he denied the payment indicates that he has a guilty conscience. The rulings show that in the case of such gifts the criterion is the intention of the donor. In the present case the intention of the donor appears to have been to influence voters in

mohalla Bhairon." The Commissioners therefore considered that in this case the charge of bribery was proved.

From October the 20th to November the 24th the municipal treasurer Lala Bishambhar Nath, was the election agent of Babu Prag Narain until he was removed on the representation of the chairman. The Commissioners considered that the employment of the municipal treasurer as an election agent was "improper", though the Government order prohibiting such appointments was issued after he had been appointed.

Certain annexures were filed with the petition. It was represented that they were false statements of facts published by Babu Prag Narain or with his connivance which would come under schedule V, part I, rule 4. Extracts from the annexures which come under this rule are as follows :—

"Ab ki bar mere mitr khub hoshyar raho aisa ko na vote do jo janat kuchhuna hai.

"Public ke dukh dard ka khuyal jinhe apni hi amad ko ja ke karen duna hai.

"Bagula sa dikhaiga hanson ki sabha ke madya kahen kavi santh jo budh ka bihuna hai.

"Council ke member bhi tali do hansenge khub dekhiye janab yeh Agra ke namuna hai.

"Hokar yeh Hindu hai Yamnon ka sathi kama Nawab Chhatari ad ko dawat khilawega.

"Milna Government se ise bund theke hue Council men paunch nij theke khulwawega.

"Ap mitr hun banawe pher ankhen diklawe yeh asteen ka syap samai pai dus jawega." (Annexure M.)

"Shahr Agre bich men ailan member hogi ek bhari hai.

Ek taraf se Lalaji awaen dusri taraf se income jari hai."

Evidence was given by the brother of the candidate, Babu Kishan Lal, to show that these allegations against the personal character of Babu Kishan Lal were false. No attempts were made to rebut the evidence. The Commissioners considered the statements to be false and reasonably calculated to prejudice the prospects of the election of Babu Kishan Lal. It was held that Babu Prag Narain paid for the printing charges and was responsible for the publication of four of the annexures and was therefore guilty of the corrupt practice.

In a previous election petition from the same constituency in which judgment was delivered on the 8th January, 1926, Babu Jai Narain Singh was found guilty of a corrupt practice, viz., abetment of personation under schedule V, part I, rule 3. His name therefore should have been removed from the roll of electors on the first occasion when it was revised after the finding of the commission that he was guilty of a corrupt practice, as he was disqualified for five years from January the 8th, 1926. This was not done. Babu Prag Narain was a party to that case and must be

taken to have had notice of the finding published in the gazette. He admittedly engaged Jai Narain Singh as his polling agent and signed the slip appointing him as such. The Commissioners pointed out that under 31 and 32 Vict. C. 125 of Parliamentary Elections Act, 1868, section 44 provides that if a candidate is proved to have personally engaged as a canvasser or agent, any person, knowing that such person has within seven years previous to such engagement been found guilty of any corrupt practice by any competent legal tribunal or been reported guilty of any corrupt practice by a Committee of the House of Commons or by the report of the Judge upon an election petition the election of such candidate shall be void.

They pointed out that there is no similar provision in the electoral rules, "though it might very well be added". They considered that the action of Babu Prag Narain in appointing Babu Jai Narain Singh was "highly improper".¹

The allegation was made in the petition that Babu Prag Narain got one of his workers, Hazari Lal, to file a criminal complaint against Shankar Lal, a polling agent of Babu Kishan Lal, with intent to debar him from working and to overawe voters in the Rikabganj ward. The Commissioners found it proved that Babu Prag Narain did write a letter to Babu Puran Chand, a yakil, asking him to file this case, and further that on November the 8th, 1926, Babu Prag Narain wrote as follows on an application by Hazari Lal for the grant of a lease of land in Freeganj at Rs. 50 yearly from the municipal board, Agra :—

"I think the applicant would be a good lessee. I recommend the application."

Hazari Lal filed the criminal complaint of assault against Shankar Lal on November the 17th, 1926, and eventually a warrant was issued though the case ended in a compromise on January the 8th, 1927. It was argued for the defence that as the election took place on November the 26th, Shankar Lal was not aware of the proceedings. The Commissioners found that Shankar Lal's evidence showed that "he was aware of the proceedings and apparently evaded service of summons which, no doubt, must have interfered with his election work". The Commissioners considered it proved that Babu Prag Narain did instigate the filing of this criminal case by Hazari Lal against Shankar Lal with intent to debar Shankar Lal from working as canvasser and polling agent, and that this interference amounted to undue influence under rule 2, schedule V, part I.²

Finally, it was held that eight items of election expenses were not lodged in the prescribed manner. One of these related to a payment of

¹ See para. 7, part IV of Corrupt Practices Order, 1936.

² Section 2 of first schedule of Corrupt Practices Order, 1936.

Rs. 15 to Kishore Lal by Babu Lal, election agent for Babu Prag Narain. Kishore Lal stated that he received Rs. 50 from Babu Prag Narain and gave receipt for it. The explanation of the respondent was that he was willing to pay Rs. 10 to Kishore Lal in addition to the Rs. 15 already paid, of which Rs. 10 was not in fact paid. On November 16th, Babu Lal, election agent for Babu Prag Narain, wrote to a mukhtar saying—

“The affair of Babu Kishore Lal has been settled, and I have got the sum with me, he may take it from me at any time.”

The Commissioners were unable to believe the evidence that Kishore Lal's affair had been settled. A payment which had not been entered in the election returns was clearly made.

Another omission was the payment made to Saraswati Prashad, canvassing agent of the respondent. A letter from Babu Prag Narain was proved appointing him as canvassing agent on Rs. 20 p.m., dated the 2nd October, 1926. Only Rs. 10 was entered in the returns on this account. “The Commissioners considered that it is proved that in addition to the Rs. 10 entered, at least Rs. 20 more was paid to Saraswati Prashad. The contention of Babu Prag Narain that he may not have worked well is beside the point.”

Certain annexures were proved to have been printed for Babu Prag Narain at the Jain, Sarawast and Mahabir presses. “The returns do not show any payments made or sums still due to any of these printing presses.

The sums paid for hire of motors and tongas are not entered.

The books of the business firms owned by B. Prag Narain (Ice factories, etc.) show that there were three *hundis* drawn by Kunjimal on himself endorsed by B. Prag Narain, and it is admitted that these were accommodation *hundis* for the benefit of B. Prag Narain who sold them to the firm of Nandram Chotelal a firm owned by the wealthy Surajbhan and Tarachand, polling agent of B. Prag Narain. These *hundis* were dated October 19 and October 30 and December 9, 1926. The total sum is Rs. 3,000. This sum appears to have been a loan raised by B. Prag Narain, but he did not show it in the return of election expenses.

The books of the firm of B. Prag Narain show that considerable balances of the firm are retained in the possession of B. Prag Narain. Outside the books of the firm which only deal with income and expenditure of the firm, there are no books at all of B. Prag Narain according to his statement.

He earns a considerable income as a senior vakil and he has the income from his firm, but he states that he maintains no account at all of his private expenditure. It is not compulsory for a candidate to keep accounts of his private expenditure, but in the absence of such accounts

it is not possible for him to prove what expenditure he actually did make. For the return of election expenses made out by the election agent may of course have any number of omissions, as in fact the present return is proved to have.

We consider that the actual expenditure of B. Prag Narain is much greater than is shown by his return.

Our finding is that the return of election expenses was false in material particulars.

The Commissioners unanimously recommend that the election of B. Prag Narain is void under rule 44(1) of the election rules. As no other party claims the seat, the Commissioners report that the seat is vacant.

Under rule 5(3) the Commissioners report that B. Prag Narain is guilty of corrupt practices, and under rule 5(4) of having a return of election expenses false in material particulars, and under both sub-rules B. Prag Narain is ineligible for election for five years from the date of the finding in one case and the election in the other.

Under rule 7(2) the name of B. Prag Narain should be struck off the roll of electors. It was argued that for such an order notice was necessary under rule 47, but we consider that the serving of a copy of the petition was sufficient compliance with that rule in the case of a candidate.

We allow the petitioner as costs against B. Prag Narain Rs. 5,843-10-0. The case has extended over one month so the amount is not excessive."

CASE No. III

Agra District (N.-M.R.) 1930^{*}

PIAREY LAL JAT *Petitioner,*

versus

(1) RAI BAHADUR MUNSHI AMBE PRASAD .. }
(2) BABU RAM } *Respondents.*

Definition of candidate discussed.

A candidate whose nomination paper has been refused need not file a return of election expenses.

THE petitioner, an elector in the constituency asked that the election of respondent no. 1 should be declared void on the ground that his nomination paper had been improperly accepted, and that of respondent no. 2 improperly rejected. He also asked for a declaration that respondent no. 2 had been duly elected, but later in the proceedings, at the time of settlement of issues, this request was withdrawn. It was held that the petitioner could withdraw this claim and that a recriminatory case could be abandoned. (Halsbury, vol. XII, page 453, paragraph 882; *Bombay City* 1924, annexure C.) The point was raised that Babu Ram was disqualified to hold the seat as he had not filed any return of his election expenses.

The Commissioners reported :—

“It was contended on behalf of the petitioner that as the other candidates had withdrawn their candidatures, so it was not necessary to add them as respondents to the petition, but we do not think that the above contention has any force. Rule 34¹ provides that the petitioner may, if he so desires, in addition to calling in question the election of the returned candidate, claim a declaration that he himself or any other candidate has been duly elected, in which case he shall join as respondents to his petition all other candidates who were nominated at the election. It was said that the words ‘candidates who were nominated at the election’ in the above rule means the candidates who remained nominated up to the election and not those who had withdrawn. Rule 32² defines ‘candidate’ to mean a person who has been nominated as a candidate at any election or who claims that he has been so nominated or that his name has been improperly refused, and so forth. A candidate who has subsequently withdrawn is clearly a candidate within the meaning of the above definition. We are therefore of opinion that it was necessary for the petitioner when he desired to claim a declaration for the seat for Babu Ram to join the other candidates who had withdrawn also as respondents to the petition, and as he has not done so, the result is that his claim for the seat for Babu Ram cannot stand. We therefore hold that the entire petition cannot be dismissed for the petitioner’s failure to implead the other candidates as respondents, but his relief as to the claiming the seat cannot be granted.

“The statement of Babu Ram shows that he soon after the election was sent to jail under some Ordinance and has not filed his return of election expenses. The question therefore arises as to whether he was bound to file a return of his election expenses. Rule 19(1)³ provides that within 35 days from the date of the publication of the result of an election under sub-rule (9) of rule 14 there shall be lodged with the returning officer in respect of each person who has been nominated as a

¹ Now section 8(2) of part III of the Corrupt Practices and Election Petitions Order, 1936.

² Section 1 *ibid.*

³ Section 5, part II, Corrupt Practices and Election Petitions Order, 1936.

candidate for the election a return of election expenses of such person containing the particulars specified in schedule 4 and signed both by the candidate and his election agent. Rule 22(4) ¹ provides that if in respect of an election to any legislative body constituted under this Act a return of election expenses of any person who has been nominated as a candidate at the election is not lodged within time and in the manner prescribed by or under the rules made on that behalf, neither the candidate nor his election agent shall be eligible for nomination for five years from the date of the election. The above rules show that the persons who are required to file a return of election expenses are persons who have been nominated as candidates at the election. We do not think that the words 'any person who has been nominated as a candidate at the election' include persons whose nominations have been rejected by the returning officer. The word 'candidate' has been defined to mean (1) a person who has been nominated as a candidate at any election ; (2) or who claims that he has been so nominated ; (3) or that his nomination has been improperly refused ; and (4) includes a person who, when an election is in contemplation, holds himself out as a prospective candidate at such election, provided that he is subsequently nominated as a candidate at such election. The above definition of 'candidate' clearly shows that a person who has been nominated as a candidate at any election does not come within the meaning of a person whose nomination has been improperly refused. A person who has been nominated as a candidate at any election according to the above definition comes within a different category from a person whose nomination has been improperly refused. We are therefore of opinion that the candidates who are required to file a return of election expenses are those candidates who have been nominated as candidates at the election, and not the candidates whose nominations have been improperly refused, and it was therefore not essential for Babu Ram to file his return of election expenses. We therefore hold that Babu Ram did not file a return of election expenses within the specified period and his failure to do so does not, in any way, affect the proceedings.

"In the present case it is, however, manifest that the improper acceptance of the nomination paper of Mr. Amba Prasad and the rejection of the nomination paper of Babu Ram has materially affected the result of the election. We therefore hold that the result of the election has been materially affected by the wrongful acceptance of the nomination papers of Mr. Amba Prasad and the non-acceptance of the nomination paper of Babu Ram.

"Our report, therefore, is that the election of Mr. Amba Prasad to the United Provinces Legislative Council is void, and the claim which was made for Babu Ram for the seat has been abandoned, and as there is also a defect of non-joinder he is not entitled to the seat."

¹ Now section 5 of part IV of Corrupt Practices and Election Petitions Order, 1936.

CASE No. IV
Ahmednagar District (N.-M.R.) 1926

RAO BAHADUR CHITALE AND OTHERS .. *Petitioners,*
versus
MR. FIRODEA AND FOUR OTHERS *Respondents.*

Legitimate canvassing distinguished from undue influence.

An untrue account of an isolated political act does not necessarily come within purview of section 5 of part I of the first schedule of the Corrupt Practices Order, 1936, nor is an imputation on the public conduct of a candidate necessarily excluded.

The distribution of loans from the famine fund to agriculturists could not be regarded as bribery or undue influence.

MR. FIRODEA (respondent no. 1) was elected for the general seat, and Mr. Nirhali (respondent no. 3) for the seat reserved for Mahrattas.

The petition contained charges of treating, of the publication of false statements, personation and undue influence. It was also stated that the respondent's return of election expenses was false in material particulars.

As regards corrupt practices, the Commissioners found that the charges of treating and undue influence were not established. It was proved that four persons came to a polling booth to vote at the request of a canvasser for the petitioner. Two agents working for respondent no. 1 dissuaded them from voting for the petitioner by various arguments. The four voters then said that they would not vote for anybody at all, and went back without voting. In other words these electors when approaching the polling station were beset by canvassers of the different candidates. The Commissioners held that "this amounts to a little more than legitimate canvassing and does not enable us to hold undue influence proved".

In the matter of the publication of false statements, the charge was that the respondent issued by way of reply to a leaflet published on behalf of Rao Bahadur Chitale, a statement purporting to be a summary of the latter's public acts, and in reference to the raising of the local fund cess it said that the idea of raising the cess was entirely his and he had got the resolution raising it passed unanimously; that it must hence be inferred that he also voted for the resolution; that he had not voted against it; and that in these circumstances it was misleading to say that the statement that he had raised the cess was absolutely false; that he had no occasion even to vote for the resolution, etc. etc.

Now admittedly Rao Bahadur Chitale was very keen on introducing compulsory primary education into the district and money had to be found for the purpose. He further admits that he was one of the persons who had originated the proposal to raise the local fund cess. He says he does not remember who the other persons were who had originated the proposal. He also does not remember whether it was he who had suggested to the standing committee the idea of raising the cess. The resolution to raise the cess was put by him before the general board in his capacity of president, and it was unanimously adopted without any formal voting thereon. Upon these facts, we are not prepared to hold that the statement, when we read it as a whole and bear in mind that it was made in reply to the other statement, was false. It was urged that the words in Marathi might have a sinister meaning; that they mean Rao Bahadur Chitale had dominated the will of his colleagues on the board by undue influence and thereby obtained their assent to the resolution. The words however do not necessarily mean this; they can

also be construed to mean that he had by persuasion brought his colleagues round to his views. The only other statement which is relied upon is that Rao Bahadur Chitale "did not vote on the popular side when the question about (the release of) political prisoners was before the Council". This must be held to be an untrue statement, for it is admitted that as a matter of fact Rao Bahadur Chitale had voted in favour of the resolution for the release of political prisoners. No attempt has been made to show that the false statement was made through a *bona fide* mistake. It must therefore be held that the statement was made without believing it to be true. The important question however is whether the statement was made "in relation to the personal character or conduct" of Rao Bahadur Chitale. In a similar case,¹ the Commissioners observed, "No sort of reflection or imputation is cast on the petitioner's character or conduct by the mere assertion that he had voted on a particular measure in a particular way. It is an assertion of a historical fact, a mere setting forth of an account of a political act of the petitioner in his political career. What result that act may have had on the interests of his constituents, whether it will, for instance, be a sacrifice of their interest or not, is not a question of fact, but of opinion, and any statement to that effect is not a statement of fact, but a statement of opinion, and, therefore, will not come within the mischief of the rule." In the present case, also, there was no sort of reflection or imputation on Rao Bahadur Chitale's conduct. What was said was no more than an untrue account of an isolated political act of Rao Bahadur Chitale in his political career. The innuendo that Rao Bahadur Chitale was a pro-Government man or a *jo-hukumwala* was a matter of opinion and not a statement of fact. The statement in question therefore does not in our opinion come within the mischief of rule 4,² part I of schedule V of the election rules. We are also not prepared to hold that the statement in question was reasonably calculated to prejudice Rao Bahadur Chitale's election prospects. On the whole, then the charge of publication of false statements fails. We should not however be understood to hold that we regard imputations on the public conduct of a candidate as necessarily excluded from the purview of the rule. On that vexed question we express no definite opinion except to say that if such imputations are not covered by the rule as it stands it would be desirable to amend it in view of present political conditions in this country.

Exhibits 1-A and 2-A did not bear on their face the name and the address of the printer and publisher thereof, and consequently offended against rule 8 in part II of schedule V.

¹ West Coast and Nilgiris.

² Now section 5 of part I of the first schedule of the Corrupt Practices Order, 1936.

The Commissioners held that personation was proved in six cases. In three the persons whose names were entered on the electoral roll were dead; and in three others the persons who voted from the Sangamner municipal area were proved to have been absent from Sangamner on the day of election. As to who personated these deceased and absent electors there was no evidence.

They found that it was amply proved that these cases of personation were either procured, abetted or connived at by Shivrinarayan, the polling agent of respondent no. 1 and that in consequence a corrupt practice coming within rule 4 of part I of schedule V was committed by this agent of Mr. Firodea, and held that the election of the returned candidate was void, as in their opinion a corrupt practice had been committed which brought the case under rule ¹ 44 (1) (b).

Respondent no. 1 filed a recriminatory petition alleging the commission by the petitioner, or his polling agents, canvassers or workers, of almost all the corrupt practices mentioned in schedule V, parts I and II. The Commissioners reported :—

“ We mention this array of corrupt practices not because any evidence was led to substantiate them but rather to illustrate the recklessness and utter absence of that care and caution which one expects from a person of respondent no. 1's status, position and education.

“ The gravamen of this charge is that Rao Bahadur Chitale took undue advantage of his position as chairman of the district famine fund committee by starting the advance of loans to agriculturists in June, 1926, with a view to influence their votes in the coming election, at which he desired to stand as a candidate. The operation of giving relief from the fund had ceased in about October, 1921, and the suggestion is that the chairman, when he contemplated standing as a candidate for the Council election commenced from June, 1926 to curry favour with agriculturist voters by advancing loans to them from the famine fund over which he had control. On being required to do so the Rao Bahadur has produced the list of debtors to whom loans were given. He has also produced as required his correspondence on this subject with the Collector and president of the Ahmednagar famine fund committee.

“ On going through this correspondence we have no hesitation in finding that there was absolutely nothing underhand, irregular or unfair in the conduct of Rao Bahadur Chitale in the administration of this fund. It is an admitted fact that the agriculturists in the Ahmednagar district as a class were in low water last year owing to unfavourable seasons ; and it is quite clear from the correspondence that the Collector on being moved in that behalf by Rao Bahadur Chitale allowed him to

¹ Section 3 of part I of first schedule of Corrupt Practices Order, 1936, and paragraph 7 (1), (b) of part III of the same order in Council.

advance loans from the permanent famine fund to substantial agriculturists. A circular, dated the 18th June, 1926, was issued by the Collector requiring thorough inquiries into the applications sent to them by Rao Bahadur Chitale to ascertain the solvency of the applicants and the soundness and sufficiency of the securities offered by them. No advance of any loan could be made by him unless a recommendation had been received after careful scrutiny as to the applicant's security and solvency. No doubt the Rao Bahadur could perhaps have done this on his own responsibility as this had been the mode of giving relief in previous years. In his letter to the Collector, dated the 10th May, 1926, he writes, 'of course I could do this on my own responsibility, but I have been always acting under the advice of the Collector, who as head of the district is of course in touch with the distressing conditions prevailing in the district.' We consider Mr. Firodea's allegations in this respect most reprehensible inasmuch as he was himself a member of the managing committee of the fund and could easily have obtained any information he wanted from authentic sources. He was himself going to stand as a candidate along with the Rao Bahadur, and though he knew that these loans were being advanced from June or July, 1926, he never complained to the Collector and the returning officer on the subject; he never approached the chairman to obtain information about these loans or about the administration of the fund. He admits he saw Mr. Bhide the Collector but never asked him whether the loans were made with his consent. He says he learnt about the end of September, 1926 that these loans were having an adverse influence on voters as regards his candidature and yet never informed the returning officer. Perhaps he fancied that this undue influence on the agriculturist voters was being sufficiently counteracted by the statement in the leaflet exhibit 1-A in the original petition that this gentleman who posed as their friend was the *fons et origo* of the increase in their local fund and irrigation cesses.

"It was argued that these loans were gratifications given to voters with the object of directly or indirectly inducing them to vote for the petitioner. As a matter of fact the loans were not advanced by the chairman personally from his own purse—but he was simply performing the ordinary duties of the chairman of the famine fund committee. We think there is no merit whatsoever in this contention, and it only emphasizes the recklessness with which the recriminator makes the most serious allegations against the conduct of his opponent without a shred of evidence to base them on. We find there is no bribery and no undue influence in what he has alleged and that therefore the charge of this corrupt practice fails."

The election was declared void.

CASE No. V.

Akola South (N.-M.R.) 1924.

(CENTRAL PROVINCES LEGISLATIVE COUNCIL.)

MR. DINKAR RAO DHAR RAO NAIK RAJURKAR *Petitioner,*

versus

MR. JANARDAN BHALCHANDRA SANE .. *Respondent.*

Though it would be better if the returning officer remained in his public office at the *kacheri* for the purpose of receiving nomination papers, his private office is within the meaning of the electoral rules "the office".

The burden of proving interference with the voters to such an extent as materially to affect the result of the election rests on the petitioner. Absence of evidence of those who were influenced against the petitioner, and the fact that no complaint was made to the presiding officer, regarded as important omission.

THE substance of the petition is that the election of Mr. J. B. Sane by a majority of 43 votes was procured upon an invalidly presented nomination paper, by the threats of Mr. Vinayakrao Gokhale, Pleader of Basim, improper interference with the freedom of election by Mr. Ganu, the Akola Superintendent of Land Records, and official pressure of some patwaris and revenue inspectors.

The complaint about the nomination paper is that it was presented at 3 P.M. and not before 3 P.M. on November 20th, 1923, and it was presented to the returning officer at his bungalow which is not a presentation at his office within the meaning of the rules. The alleged threat by Mr. Gokhale, pleader, is that on the polling day at Basim, just outside the polling station, he declared that those who voted for the Maratha candidate would have to seek Maratha pleaders as their legal advisers, as the Brahmin pleaders of Basim would not work for them. The petitioner was recognised as the Maratha candidate, and this threat is said to amount to a corrupt practice that has vitiated and materially affected the election. The interference by Mr. Ganu is that he toured in the vicinity of Givha where he was appointed presiding officer for the election and urged the people to vote for Mr. Sane, and on the polling day he attempted to persuade voters to vote for Mr. Sane, using his official position and influence. He also improperly refused voting papers to certain persons who were on the list of voters. The complaint about patwaris and revenue inspectors was that one Renukadas, patwari, who was appointed assistant polling officer at Givha, threatened his official displeasure against those who did not vote for Mr. Sane.

The first question of importance is whether the nomination paper was presented within time. It has been urged for the petitioner that the endorsement of the returning officer itself shows that the paper was presented at 3 P.M. and not before 3 P.M. Rule 10(3), however, does not use the words "before 3 P.M." It directs that the nomination paper shall be presented to the returning officer "between the hours of eleven o'clock in the forenoon and three o'clock in the afternoon". Any time infinitesimally short of 3 P.M. would be within the scheduled time, and therefore a presentation "at 3 P.M." is within time. Moreover, the petitioner himself has filed as his own evidence a copy of the order of the returning officer (who is in England and could not be called as a witness) which runs thus: "Pandit J. B. Sane brought his nomination paper to the district officer a little before 3 P.M. on the 20th and found that I had left the office for the bungalow. He brought his nomination paper to my bungalow and gave it to me in my office room there within the statutory hours." Thus from the petitioner's own evidence the presentation was within time. Further the Commissioners unanimously agree in accepting the sworn testimony of Mr. J. B. Sane, that he went to the *Kacheri* of

the Deputy Commissioner at 12-45 and waited till about 2-30 P.M. and then, on making enquiry and learning that the Deputy Commissioner had left word that candidates should be sent to his bungalow, went there and handed the papers to the returning officer 10 or 12 minutes before 3 P.M. That officer perused the papers and referred to the rules before signing the delivery endorsement and noting the time of signing which was just 3 o'clock. The Commissioners have no hesitation in holding that the papers were delivered to the returning officer within the statutory time. They would, however, like to observe that the words "date and hour" in the printed certificate of delivery are vague, and should, in their opinion, be changed to "date and time".

The next question is the one that has given rise to much discussion, viz. whether the presentation at the bungalow of the Deputy Commissioner is a proper and sufficient presentation within the rules. It has been strenuously contended that rule 10 does not prescribe any place for the presentation, and therefore the delivery to the returning officer in his office room at the bungalow complies with the rule. Against this it is urged that rule 10(3) must be read with the form of nomination given in schedule III which shows that the presentation must be at the office, and that office is the same building as is mentioned in clauses (7) and (9) of rule 10.

The Commissioners have considered this vexed question, and have decided that the presentation at the bungalow does comply with the rule. At first sight it appears that the footnote on the nomination form goes beyond clause (6) of rule 10 and is *ultra vires* in inserting the words "at his office", but a further consideration shows that this is not so. Clause (6) rejects all nomination papers presented after 3 P.M. on the last day fixed for presentation; but it cannot be assumed conversely that all papers received before that time must be accepted, as that would conflict with clause (3) which prescribes that the presentation must be between 11 A.M. and 3 P.M. Nomination papers can be rejected on other grounds and the footnote to the nomination form is an indication that such papers will be invalid unless presented at the office. The place of presentation, therefore, becomes important. We are of opinion that the whole form of nomination must be read as a part of rule 10(3). The full meaning of this clause cannot be ascertained without a reference to the form. The clause is incomplete without the form itself. Then when the form is read, it is found to contain a clear direction as to the place of presentation. Twice it is mentioned that the delivery must be at the office of the returning officer, and that direction cannot be excluded from the rule or disregarded by the candidate. The question then arises whether the office room in the bungalow is an office of the returning officer for the purpose of such presentation. The word "office" has never, so far as we are aware, been judicially defined; but we are of opinion that in

this particular case we have sufficient material for a decision. The schedule in regulation III under rule 14 shows that the returning officer is the Deputy Commissioner (*ex-officio*) and we conclude that the office of the returning officer is the office of the Deputy Commissioner as such. Now undoubtedly *prima facie* the office of the Deputy Commissioner is the building known as the *Kacheri* where the courts are held and general administrative work of the district is conducted. But we have clear evidence, which we find satisfactory, that this particular Deputy Commissioner ordinarily did his work in the *Kacheri* until about 2 P.M. daily and did the rest of his work in the office of his bungalow from 2 P.M. onward. This custom was well known to the members of the Bar and the litigant public. Thus by custom there were two offices with fairly well-defined times. Moreover, we have evidence that the returning officer had left specific instructions that any candidate bringing nomination papers should be sent to the bungalow. Hence, although we feel that it would certainly have been better if the returning officer had remained in his *Kacheri* on those days until 3 P.M., we consider that the nomination papers of Mr. Sane were delivered to the returning officer, "at his office" within the meaning of the rules.

We find that the nomination papers were delivered before 3 P.M. on November 20th, and they were validly presented in compliance with the rules. There was no improper presentation or acceptance.

The witnesses who speak of the alleged interference by Mr. V. V. Gokhale, pleader, who was admittedly the polling agent of Mr. Sane, are nos. 1, 11 to 16 for the petitioner and nos. 1, 3, 5 for the respondent. The burden of proving the allegations lies upon the petitioner and it is our unanimous opinion that he has failed to discharge it. The evidence is very discrepant and the witnesses are all partisans.

A very singular feature of the evidence is that none of the persons, who are said to have been influenced against the petitioner, have been examined as witnesses. Those who have come forward say vaguely that many persons went away and did not vote. They are not able to give the number of such persons or their names, nor even to say whether they were voters or mere spectators. Even Punjaji himself as A.W. 16 cannot name any of those voters who are said to have been driven away by the remarks of Mr. Gokhale, although he claims them as his acquaintances. The witnesses who speak on this issue, with the exception of A.W. 11 and 13, who have been completely discredited, all voted for the petitioner. There is, therefore, nothing whatever to show that anything was said that influenced the election in any way. And another circumstance which cannot be disregarded is that no complaint was made to the presiding officer or the returning officer. If it had been a fact that Mr. Gokhale had been interfering with the freedom of election in the manner alleged by the petitioner he would naturally have informed the

Sub-Divisional Officer who was presiding officer and whose duty it was to stop any such interference. Or, if that opportunity of protest had been allowed to pass, the petitioner would have mentioned the occurrence at the time of counting, if he felt aggrieved. All this points to the conclusion that this is an after-thought based perhaps upon some very trivial incident that had no effect in reality.

Our finding is that the alleged interference has not been established. We find that there was no corrupt practice.

Three charges are brought against Mr. Ganu, the superintendent of land records—(1) an endeavour to persuade persons to vote for Sane during his touring on December 2nd to 5th, (2) an attempt to induce voters similarly while acting as presiding officer at Givha, (3) a refusal to allow certain persons to vote.

This last charge, vaguely stated in the petition to apply to "certain voters" and to have "materially affected the election", is whittled down in pleadings to two persons, Govinda and Daryaji. The former is A.W. 8, whose deposition in our opinion, shows that he never went near the place of polling and is ignorant of the procedure. Ganu as respondent's witness no. 4 admits that he refused to give Daryaji a voting paper, but gives a satisfactory reason. This man did not fully tally with the description in the voter's list and he was asked to bring some one to identify him. Renukadas as R.W. 6 corroborates this. The objection was that Daryaji admitted that he was not the working Patel. Ganu says that this raised in his mind a *bonâ fide* suspicion as to the man's identity and he asked for some one to remove the doubt. R.W. 6 corroborates this. But even if this were not a justifiable refusal, it cannot be held that the whole election was thereby materially affected by the refusal of one vote.

[The Commissioners found that the evidence did not establish the allegation that Ganu was deliberately interfering with the election during his touring on the four days preceding the polling. They add] :—

"Then we come to the alleged interference at the time of polling. Here we again meet the significant fact that all these witnesses who speak of threats, inducements and coercion, actually voted for Dinkar Rao as they had always intended to do. As regards Surybhan A.W. 4 we are of opinion that this man probably intended to vote for Sane as he did in fact, although he is reluctant to admit it in court in the presence of Dinkar Rao and so makes his rambling statement about not knowing in what box he put his paper, although he was specially told that Dinkar Rao's box was red. But even if this man's vote was changed on account of something said by Ganu, this could not be said to have materially affected the election. It is quite possible that he wanted to vote for Dinkar Rao, and put the paper in the wrong box by mistake as he says

he did vote for Dinkar Rao. The truth cannot be ascertained and the Commissioners do not feel able to rely upon this man's deposition.

Such is the evidence on this supposed interference at the time of polling. Not one of these voted for Sane, but all for the petitioner. Thus if Ganu said anything at all it had not the least effect. It is quite probable, and this he admits, that when voters appeared confused and not knowing what to do he directed them to the boxes and told them what to do. It is even possible that he asked some of them for whom they wanted to vote and then gave directions as to the boxes. Dealing with illiterate villagers is not the same thing as conducting an election in a big town. The Commissioners are not satisfied that this evidence is sufficiently reliable to establish any direct interference by Ganu, and are quite convinced that any such advice as may have been given failed to change the election in the very least. It is noteworthy that the petitioner's own polling agent Dajibarao, who is said to have been there all the time, has not been called as witness. Also no complaint seems to have been made to him about Ganu interfering. What Ganu did raised no protest at the time. Further it is noted that not one of the several patwaris and patels, who were in the courtyard within a few feet of Ganu, all the time, had been called. So also not one of the three schoolmasters, who were specially appointed as clerks for the polling, was examined as witnesses. Two of these were not Brahmins. When the petitioner omits to call the uninterested persons who were on the spot all the time and prefers to rely upon biased adherents of his own cause, he must not be surprised if adverse inferences are drawn against him.

The Commissioners are unanimous in their opinion that no grounds have been established for declaring the election of Mr. J. B. Sane void, and the petition should be dismissed with full costs on the petitioner, allowing as pleaders' fees the sum of Rs. 350 (three hundred and fifty rupees). They accordingly humbly submit their report to His Excellency the Governor for his orders under rule 40 of the Berar electoral rules."

CASE No. VI .
Akyab (Indian Urban) 1928
(BURMA LEGISLATIVE COUNCIL.)

MR. S. MAHMUD *Petitioner,*

versus

MR. R. K. GHOSE AND ONE *Respondents.*

Particulars of charges can only be amended by amplification or the giving of further details. Where a petition gives no instances or particulars of a charge, these cannot be furnished later and no evidence can be adduced on it.

Rulings in *Attock*, *Bulandshahr East*, *Kangra*, *Amritsar*, *Kistna*, *Bombay*, and *Saharanpur* discussed.

THIS petition is by Mr. S. Mahmud, one of the unsuccessful candidates for the Akyab Indian urban constituency at the recent election of November 2nd, 1928, against the successful candidate, the first respondent, Mr. R. K. Ghose, and another candidate, Mr. H. Guha, who has made no appearance. Mr. Ghose obtained 1,313 votes, the petitioner 698 votes, and Mr. Guha 69 votes. The petition was on the grounds of bribery, treating, personation, publication of false statements, the hiring of public conveyances, the issue of circulars without the publishers' and printers' names and addresses, and the submission of a false return of election expenses. The petitioner claimed the seat.

In our order, annexure A, the charges of bribery were struck out for lack of sufficient particulars, while some other charges or parts of them were abandoned. The circulars and placards in question were subsequently received, and were found not to be printed matter.

On the day fixed for the trial of the petition, the petitioner did not appear. He had made no application for the issue of summonses for his witnesses, and the additional security for costs ordered had not been furnished by him.

The petition must be dismissed for default.

We find that the respondent, Mr. R. K. Ghose, has been duly elected, and we recommend that the petitioner pay him the costs of this petition, which we assess at Rs. 450.

[ANNEXURE A]

The list of particulars, paragraph IV (1) annexed to the petition, states that the respondent paid bribes to "the electors" of five named wards in Akyab town.

The petitioner asks at this, the preliminary hearing, to be allowed to furnish at a later date further particulars of the sums paid, the dates and places of payment, the names of the respondent's agents employed by him to make the payments, the dates and places of the payments to them, and the names of the recipients.

Rule 33(1) enacts that the petition shall contain a concise statement of the material facts relied on. It shall be accompanied [sub-section (2)] by a list setting forth full particulars of any corrupt practice alleged, including as full a statement as possible as to the names of the parties alleged to have committed any corrupt practice, and the date and place of its commission. Sub-section (3) provides that the Commissioners may at any time allow the particulars included in the said list to be amended, or order further and better particulars to be furnished.

The question of amendment of particulars has been discussed in several reported election enquiries. It has arisen under two closely similar forms :—

- (1) Where a vague or general charge has been made in the petition, and it is subsequently sought to amend it by giving particular instances ; and
- (2) Where instances have been given in the petition, and it is sought to give evidence of other instances of the same sort.

As to the first of these kinds the *Attock* case,¹ merely allowed some elucidation of particulars.

In the *Lahore* case (see page 469), intimidation by " certain spiritual leaders " was alleged, and particulars of the names were allowed to be given later. This case however and the other cases, were decided under the electoral rules of 1920, where rule 31 (equals the present rule 33) contained no provision corresponding to the present subsection (2) of rule 33, which requires a list of particulars with names and dates and details of the corrupt practices alleged.

The *Bulandshahr East* case (see page 219), the *Saharanpur* case (see page 623), and the *Kangra* case (see page 439), quote with approval and follow the remarks in the *Worcester* case given at page 154, Hammond's Indian Candidate edition of 1920 (not reproduced in the 1923 edition) : " To deliver particulars with nothing but the name of the candidate and the character of the offence, leave everything else in blank, and attempt to fish out some possible materials from which the blank may be filled up is an abuse of procedure."

In the case before us we have of course only the character of the offence, the name of the respondent, and the names of five wards of the town, and everything else is left blank. It cannot be said that any attempt has been made to give full particulars.

As to the second kind, in the *Amritsar* case (see page 85), the petition vaguely alleged a large number of personations, and gave one instance only in the particulars. On an application to add fresh instances it was held that only the particulars included in the list could be amended, and that it would be straining the language of the rule to hold that the word particulars includes fresh instances of a similar kind.

The *Rangoon West* case,² is to the same effect. On the other hand it was held in the *Bombay* case (see page 178), that the addition of further instances of the same charge did not mean a fresh charge, but was merely an amendment of the particulars of the corrupt practice already alleged, and could therefore be allowed.

¹ I.E.P. I, 12.

² I.E.P. III, 244.

This not merely ignores the wording of rule 33(3), as is pointed out in the *Kistna* case (see page 450), but also the fact that each single instance of corrupt practices alleged is a substantive charge. It may be at a different time and place and involve different persons. It may be sufficient in itself to vitiate an election.

The general principle in England is that no amendment is allowed after the lapse of a prescribed time which would amount to constituting a new petition.

In the *Kistna* case (see page 447), there was a general charge of corruptly employing board servants, and it was ruled that a specific instance could not later be added.

We agree with the decision in that case, and with the remarks that what was sought was the amendment of *the list of particulars* by *adding* to them, while the rule only allowed amendment of *the particulars in the list* (already) by *amplification* or the giving of further details.

There is then a great preponderance of opinion that fresh instances of a similar kind cannot be given, and that where the petition gives no instances or particulars of a charge, these cannot be furnished later, and no evidence can be adduced on it.

We would agree that this is so, and are in accord with the remarks made on the subject in the *Bulandshahr East*, *Amritsar* and *Kistna* cases.

There is something more to be said on the merits of the present application, apart from the interpretation of the rules.

The petitioner's application for permission to give further particulars has been made orally. He is not represented by an advocate, and has filed no affidavits. We have examined him as to the cause of delay in making his application at this late stage, some three and a half months after the petition was filed.

It would appear from his statement that he knew of part of the particulars which he proposes to give at the time he filed the petition, and purposely suppressed them as he did not think that he could prove them.

As to the rest he has not attempted to show that he could not have discovered them with due diligence and skill when the original petition was filed, and in fact he is not ready with a large part yet, and asks for further time at this stage of the proceedings.

The application to file further particulars is rejected, and paragraph IV (1) of the particulars will be struck out.

CASE No. VII .

Akyab West (General Rural) 1928

(BURMA LEGISLATIVE COUNCIL.)

MR. E. G. MARACAN *Petitioner,*

versus

U THA BAN, K.S.M. *Respondent.*

It is not sufficient to prove irregularities at an election. It must be proved that they did actually materially affect the result of the election.

THE petitioner, Mr. E. G. Maracan, was defeated by the respondent, U Tha Ban, K.S.M., in the Akyab West rural constituency election by a majority of 4,287 votes.

He claimed that the result of the election had been materially affected by non-compliance in two instances with the regulations made under the Act, and that the election of the returned candidate was consequently void.

The first instance alleged is that the presiding officer at the Alethangyaw polling booth closed it at 4 P.M., and so prevented "over" 2,500 Muhammadans from voting who would have voted for the petitioner.

Paragraph 28 of the Burma electoral regulations provides that the poll should be kept open until 6 P.M.

The second instance relied on is that the presiding officer at the Zadibyin booth broke open the seals of both the ballot-boxes after the poll was closed, and after counting the tokens in each re-sealed them.

The procedure to be adopted is contained in regulation 38, which read with rule 46 *et seq.* obviously does not contemplate any such action by the presiding officer, whatever dispute may arise.

The respondent in his written statement said that the poll at Alethangyaw was closed at about 5 P.M., owing to a riot which was started by the Muhammadans.

The incident at Zadibyin was admitted. It is said that the boxes were unsealed and the tokens counted in the presence of the agents of both sides, and that this was done because there was some dispute about one vote.

It is admitted that the figures in the voting return are correct, and from these it appears that 573 tokens were found in the ballot-box, while the presiding officer had issued 574 tokens. Of these votes, 545 had been cast for the respondent and 28 only for the petitioner.

The petitioner's advocate did not wish to cite any evidence on the Alethangyaw incident even as to the numbers of voters affected. It might be remarked that it is highly improbable that at so late an hour so large a number of voters could have been denied the opportunity of voting.

It is obvious that the number of votes affected by both incidents, assuming that all the votes at Zadibyin were affected, 2,500 *plus* 573, or in all 3,073 votes is far less than the majority gained by the respondent.

At a preliminary hearing the petitioner was asked to show why the case should not be decided on the pleadings.

His argument was that an irregularity of the kind that occurred at Zadibyin vitiated the whole election, but he could adduce nothing to support such a contention. An irregularity in the nomination paper stands of course on a different footing.

On the incident at Alethangyaw the petitioner's advocate quotes the *Champaran North* case (see page 303), where it was remarked in a case where the majority was only 122, and no less than 515 persons out of a total of 1,731 were prevented from effectively recording their votes, that the Commissioners were of opinion that it would be wrong to allow the election to stand. In that case if the votes irregularly recorded had been rejected the petitioner would actually have obtained a majority.

That case bears no analogy to the present one. The law on the subject is quite clear. The petitioner must show that the irregularities complained of did actually materially affect the result of the election. Here it is clear that they did not do so, and it is not even conceivable that they might have done so.

Nor is it the case that a majority of the electors were prevented from recording their votes effectively (see *Woodward vs. Sarsons*, appendix II, page 731).

The petition must therefore be dismissed. We find that the returned candidate, U Tha Ban, K.S.M., has been duly elected, and we recommend that the petitioner shall pay the costs of this petition, which we assess at Rs. 255, to the respondent.

CASE No. VIII
Aligarh District East (N.-M.R.) 1923
(UNITED PROVINCES LEGISLATIVE COUNCIL.)

THAKUR UDAYA VIR SINGH *Petitioner,*

versus

RAJ KUMAR SINGH *Respondent.*

Trivial misdescription in a nomination paper should be condoned. If the mistake misleads nobody and causes no misgiving in the mind of the returning officer as to identity, the nomination paper should not be rejected.

The entry of age in a horoscope supported by documents in the handwriting of persons who are dead held sufficient to rebut the entry regarding age in a school register.

THE petitioner Thakur Udaya Vir Singh was a candidate for election to the United Provinces Legislative Council from the Aligarh District East non-Muhammadian rural constituency. In the space for the name of the constituency in all his nine nomination papers the petitioner had put down "Aligarh East non-Muhammadian rural". The returning officer on 7th November, 1923, rejected the petitioner's nomination papers by the following order :—

"Declared invalid as the name of the constituency has not been correctly given. It should be 'Aligarh District (East) non-Muhammadian rural'. There is no such constituency as 'Aligarh East'. This is a technical matter in which I hold that absolute accuracy is essential." The petitioner urges that this invalidation by the returning officer was improper.

Besides the petitioner there were two other candidates for the same constituency, viz. Kunwar Raj Kumar Singh of Barauli and Pandit Basdeo Sahai of Gangiri. The nomination paper of Pandit Basdeo Sahai Sharma was also rejected.

The nomination papers of Thakur Udaya Vir Singh and Pandit Basdeo Sahai Sharma having been rejected by the returning officer, Kunwar Raj Kumar Singh was returned unopposed as a member of the Legislative Council. His election has been called in question by Thakur Udaya Vir Singh on the grounds specified in his election petition, of which the main one is that Raj Kumar Singh was under 25 years of age on the day of his nomination. Basdeo Sahai Sharma has been joined as a formal respondent. The petitioner has claimed the seat for himself.

We are of opinion that the refusal of the petitioner's nomination by the returning officer was not justified. The abbreviation of the name of the constituency by the omission of the word "District" should have caused no misgiving in the mind of the returning officer as to the identity of the constituency, because there was no other constituency of a similar name with which "Aligarh East" could have been confounded. In fact, on the 6th November, the returning officer had posted on the notice board in front of his office the names of the nominated candidates and their constituencies, including that of the petitioner as a candidate for the Aligarh District (East) non-Muhammadian rural constituency. Raj Kumar Singh, respondent no. 1, himself described the constituency in question as "Aligarh East" in his nomination paper exhibit 1(b) and his declaration of the appointment of his election agent on the back of the nomination paper exhibit 1(a). We find that in some provinces, the word "District" is used after the names of the district constituencies, while on others it is not. In the *United Provinces Gazette* of the 24th November, 1923 (part VIII), page 632, the two non-Muhammadian rural constituencies of Bulandshahr district are described

as simply "Bulandshahr (East)" and "Bulandshahr (West)". Nor is the word "District" added to the names of any of the district constituencies therein mentioned. In the *United Provinces Gazette*, dated the 5th of January, 1924 (part I), page 18, the constituency of Meerut District North is described simply as "Meerut North". If this not inconvenient abbreviation of the name of a constituency as created by statutory rules is permissible in official publications, too strict a view of the omission of the word "District" by the returning officer was not justified. The misdescription was trivial and should have been condoned. It was a mere mistake in the use of a form which could mislead nobody. This is the principle underlying the English Ballot Act.

It was conceded by the learned counsel for the respondent no. 1 that the question of the latter's age could be raised before us even though no objection to his age was taken before the returning officer.

The objections set out in paragraph 12 of the petition are (a) that respondent no. 1 was under 25 years of age, (b) that he was not the adopted son of Rao Karam Singh, (c) that he had differently given his parentage in different nomination papers, and (d) that his nomination was not according to rules. With the question of the respondent's adoption we are not here concerned so long as there is no dispute about his identity. Nor does it matter whether he described himself as the adopted son of Rao Karan Singh in one nomination paper, or as the son of his natural father Balwant Singh in another. At least one of his nomination papers exhibit 1-A, in which he has described himself as the adopted son of Rao Karan Singh, is valid.

The only other important question to consider is whether Raj Kumar Singh was under 25 years of age on the date of his nomination, which was one of the grounds of the written objection of respondent no. 2 before the returning officer.

According to the scholars' register exhibit 5, Raj Kumar Singh was admitted to the Aligarh branch school on the 14th of December, 1906, when his age was put down as "eight years". He was admitted to the Aligarh district school on the 8th of July, 1908, according to the scholars' register exhibit 4, and his age was then recorded as 9 years 6 months and 24 days. According to this he would be 24 years 10 months and 22 days (i.e. less than 25 years) on the 5th of November, 1923, which was the nomination day. This calculation is evidently based on the assumption that the respondent was exactly eight years old on the 14th of December, 1906. The petitioner relies on the entry of the age of respondent no. 1 in the scholars' register exhibit 4, which he says he inspected on the 7th of November, 1923.

The petitioner has also summoned the record of the year 1917 in which Raj Kumar Singh on the 4th February, 1918, gave his approximate age as 19.

After discussing the evidence the Commissioners reported :—

We are of opinion that the evidence produced by respondent no. 1 has sufficiently rebutted the entry in the scholars' register exhibit *4 about the age of Raj Kumar Singh, which was based on the entry in the branch school scholars' register and therefore cannot be held to be accurate. The horoscope exhibit B1 and at least two varashphals are in the handwriting of persons who are dead and these documents could not have been manufactured for the purposes of this case. According to the horoscope, and this is confirmed by the 10 varashphals produced by respondent no. 1, he was born on the 18th of November, 1896, and he was therefore above 26 years of age on the date of his nomination, i.e. the 5th of November, 1923. We hold that Kunwar Raj Kumar Singh was duly qualified for election.

It follows from what has been said above that the acceptance of the nomination of respondent no. 1 was not improper, but the refusal of the nomination of the petitioner was improper. It is clear that the election of respondent no. 1 was materially affected by the improper refusal of the petitioner's nomination.

We, therefore, recommend to His Excellency the Governor that the election of Kunwar Raj Kumar Singh should be held to be void. The petitioner has succeeded on one issue, but failed on the issue about the age of respondent no. 1.

In the special circumstances of the case we recommend that the parties do bear their own costs.

CASE No. IX .

Aligarh District West (N.-M.R.) 1923

(UNITED PROVINCES LEGISLATIVE COUNCIL.)

THAKUR SHIB NARAYAN SINGH *Petitioner,*

versus

THAKUR LAKSHMI RAJ SINGH *Respondent.*

Where there is doubt as to the spelling of the name of a candidate, proposer or seconder, the returning officer should hold a summary enquiry. Absolute literal accuracy is not essential. The description should be such as is "commonly understood".

Evidence of age in school register accepted in preference to that given in a horoscope.

THE petitioner Thakur Shib Narayan Singh and the respondent Thakur Lakshmi Raj Singh were the only two candidates for election to the United Provinces Legislative Council from the Aligarh District (West) rural non-Muhammadan constituency at the last general election. The petitioner was nominated by means of three nomination papers, but on the day of the scrutiny, the 7th of November, 1923, all these three nomination papers were declared invalid by the returning officer on the following grounds :—

- (a) “ As the name of his proposer given as ‘ Bhawani Shanker ’ does not agree with the electoral roll where the name is given as ‘ Bhamani Shankar ’.
- (b) “ That the age has not been properly given. Only ‘ 41 ’ has been written, and the word ‘ years ’ has been omitted. This is a technical matter in which I hold that absolute accuracy is essential. I am not entitled to make any presumption whatsoever as what is correctly intended.
- (c) “ As the name of the proposer given as ‘ Lajja ’ does not agree with the electoral roll, where the name ‘ Lajia ’ is given. These are two different names.”

The petitioner had taken an objection before the returning officer as to the age of the respondent, alleging that Thakur Lakshmi Raj Singh was under 25 years of age on the day of his nomination and as such was ineligible for election, but the returning officer overruled this objection and declared the nomination of the respondent to be valid. Thus Thakur Lakshmi Raj Singh, being the only validly nominated candidate, was returned unopposed.

On the pleadings of the parties the following two issues were framed by us :—

- (1) Was the invalidation of the petitioner's nomination by the returning officer improper ?
- (2) Was the respondent ineligible as a candidate owing to the fact that he was under 25 years of age on the 5th of November, 1923 ?

Issue 1.—The petitioner's nomination papers are exhibited as exhibits 1, 2 and 3.

In exhibit 1 the name of the proposer is signed “ Bhawani Shankar ” and his electoral roll number is given as no. 1752. The electoral roll in Aligarh is prepared in both Urdu and Hindi. The election officer Babu Mahadeo Prasad has stated that “ in this district we have been acting upon the electoral roll in Urdu and not on that in Hindi ”. He admitted, however, that there was no Government order which preferred the Urdu to the Hindi copy of the electoral roll and we can see no ground

for preferring one to the other. The returning officer looked up the Urdu copy of the electoral roll and found that the name given against no. 1759 was "Bhamani Shankar". In consequence of this disagreement with the signature of the proposer he declared the nomination invalid. If, however, he had looked at the Hindi electoral roll he would have found that the name there given against no. 1752 was "Bhawani Shankar", i.e. the exact name given by the proposer in nomination paper exhibit 1.

We have been referred to and taken through a number of English decisions on questions cognate to the point which we have before us. These are, however, anterior to and have doubtless been considered in the Indian electoral law, and we see no necessity in this case to travel beyond the Indian rules, which are clear and full.

Regulation 9 made under rule 13(1) of the United Provinces electoral rules and printed on page 3 of the *United Provinces Gazette*, Extraordinary, dated the 4th July, 1923, sets out the grounds on which the returning officer may refuse any nomination. Among them are :

Nine (i) (ii) that the name of a proposer or seconder is not entered on the electoral roll of the constituency, and 9 (i) (iv), that the candidate or any proposer or seconder is not identical with the person whose electoral number is given in the nomination paper as the number of such candidate, proposer or seconder as the case may be. •

Rule 9(i) further contemplates the refusal of a nomination after such summary inquiry as the returning officer thinks necessary.

It needed a very summary inquiry, if any, in this case to satisfy the returning officer that the proposer on exhibit 1, was identical with the person shown in the electoral roll against the corresponding number. A mere reference to the Hindi electoral roll would have set the matter at rest.

The insistence by the returning officer on absolute literal accuracy was overdone. The object to be kept in view in filling up the nomination paper is "that a person who sees the nomination paper may be able to decide whether the candidate is properly nominated or assented to by enrolled burgesses and to determine this by a mere comparison of the nomination paper and burgess roll without any further and laborious inquiry". (*Moorhouse vs. Linney*, XV, Q.B.D., 1885.)

It is further laid down in the English Act, 45 and 46 Victoria C. 50, on a cognate subject that no inaccurate description of any person should hinder the operation of the Act, with respect to that person provided the description be such as to be *commonly understood* (*ibid.*). It is the misleading of the electorate that is to be avoided.

We think that the nomination paper exhibit 1, satisfies the principles above enumerated. Even if the fact that the name of the proposer is given in the Hindi electoral roll in the same form as in the nomination paper be ignored, we are of opinion that the writing of the proposer's

name as " Bhawani " could have misled no one as to his identity. It was, doubtless within the returning officer's knowledge that " Bhawani " and " Bhamani " are interchangeable renderings of one and the same name. Such interchange of letters in words is quite a common feature in this province and is in keeping with philological rules.

We, therefore, find that the returning officer improperly declared the nomination paper exhibit 1 to be invalid. We hold that it was valid.

Issue 2.—The next question to consider is the age of the respondent on the date of his nomination, i.e. the 5th of November, 1923. The petitioner relies on the entry of the respondent's age in the scholars' register of the Government High School exhibit 13 in which the date of birth of Kunwar Lakshmi Raj Singh is recorded as the 4th of March, 1899.

We are not impressed by the respondent's evidence about his age. The horoscope exhibit A has not the appearance of an old document prepared in 1954 and the Isht from which it was prepared by Pandit Chheda Lal is not forthcoming. It is admitted that a horoscope can be prepared from any given Isht. The respondent's mother was not examined to prove the date of her son's birth, or that the horoscope exhibit A had remained in her possession and that she gave it to her son to be produced in court. The evidence of Subedar-Major Rukam Singh and the respondent's granduncle Thakur Karan Singh is not convincing. On the other hand, there is an unimpeachable entry of the date of the birth of the respondent in the scholars' register of the Government High School and this entry was made at the instance of the respondent's grandfather and in his presence. We are of opinion that the entry of the age of the respondent in the school register has not been rebutted by the evidence produced by the respondent. We find that the respondent's age was 24 years 8 months and 1 day on the 5th of November, 1923, i.e. under 25 years on the day of his nomination, and that he was ineligible for election under rule 5 (1) (f) of the United Provinces electoral rules. We have found that Thakur Shib Narayan Singh's nomination was improperly refused. He was thus the only duly qualified and validly nominated candidate for election to the Legislative Council for the Aligarh District (West) rural non-Muhammadan constituency. We, therefore, recommend to His Excellency the Governor that the election of Thakur Lakshmi Raj Singh should be held void ; that the petitioner Thakur Shib Narayan Singh should be declared to be duly elected as a member of the United Provinces Legislative Council, and that the respondent should pay the petitioner's costs amounting to Rs. 40-8-0.

CASE No. X

Aligarh, Muttra and Agra Districts (M.R.) 1923

(UNITED PROVINCES LEGISLATIVE COUNCIL.)

MOHAMMAD ABDUL WAHAB *Petitioner,*

versus

OBEDUR RAHMAN KHAN *Respondent.*

A commission of enquiry is not competent to enquire into the question of proper presentation of the petition subsequent to its admission by the Governor.

It is not necessary for a candidate to give the date when he signs his nomination paper.

At the election of 1923 for the United Provinces Legislative Council, Mohammad Abdul Wahab and Obedur Rahman Khan were candidates for the Aligarh, Muttra and Agra districts (Muhammadan rural) constituency. The nomination of Mohammad Abdul Wahab was refused by the returning officer on the ground that his declaration on the nomination paper assenting to his nomination was not dated by himself but by some other person. The respondent Obedur Rahman Khan (being the only other candidate) was accordingly returned unopposed. This is a petition filed by Mohammad Abdul Wahab.

In his written reply the respondent has challenged the validity of the petitioner's nomination, and the question arose at the outset whether he was entitled to do this seeing that there is no recriminatory petition under rule 42 of the electoral rules before us. Respondent's counsel relied on order 21, rule 22, Civil Procedure Code in support of his position. We are of opinion that we cannot apply that provision in this case. We are bound to adapt our procedure to that laid down in the Civil Procedure Code "as nearly as may be", but election law is special law and section 42 of the electoral rules has set out distinctly the conditions under which a recriminatory petition is permissible, viz. when the petitioner claims the seat for himself. In no other case is recrimination contemplated. Nor, indeed, would there be any useful object in making an inquiry into the qualification for candidature of a person who does not claim the seat for himself. Our business is confined in a case like the present one to the question whether the respondent has been properly elected.

We, therefore, think that the analogy of order 21, rule 22 is not a real one, and that the respondent's objection to the validity of the petitioner's nomination must be ignored.

Apart from this the pleadings of the parties disclosed the following two issues :—

- (1) Was the invalidation of the petitioner's nomination paper by the returning officer improper ?
- (2) Was the election petition duly presented and have the Commissioners any authority to inquire into the point after the petition has been accepted by the Governor ?

The second issue relates to the due presentation of the election petition and may conveniently be dealt with first. We are of opinion that we are not competent to go behind our appointment as Commissioners for the trial of this petition and are debarred from inquiring into the question of the proper presentation of the election petition subsequent to its admission by the Governor. We must presume that prior requisites have been complied with otherwise the petition would have been dismissed by the Governor under rule 36(1). We agree with the views

expressed by the Commissioners in the *Salem and Coimbatore-cum-North Arcot* case, 1921 (see page 629). The same question has been similarly decided in the report of the election case no. 3 of 1924, Bengal (*Dumjuma* Muhammadan constituency, see page 341). Issue 2 is therefore decided against the respondent.

This brings us to the first and main issue, viz. whether the rules require that the declaration by a candidate on the nomination paper shall be dated by the candidate himself.

Rule 11, sub-rule 3 of the United Provinces electoral rules requires each candidate, either in person or by his proposer and seconder together, to deliver to the returning officer or other authorized person "a nomination paper completed in the form prescribed in schedule 3 and subscribed by the candidate himself as assenting to his nomination and by two persons as proposer and seconder".

It is to be noted that the word "subscribed" applies as much to the proposer and seconder as to the candidate. Yet the form in schedule 3 provides no space for any date under the signature of the proposer and seconder. "Subscribe" means to write under some thing, to give consent to something written by signing one's name underneath (*Attorney General vs. Bradlaugh* 54, L.J. Q.B., 213). We can discover no authority in support of the returning officer's view that the date of declaration of the candidate assenting to his nomination must be in his own handwriting. We think that if the legislature had intended that the space provided for the date of the declaration must be filled in by the candidate himself and by no other person, it would have expressly said so, as it has done in the case of the returning officer, who is required in his certificate on the said form in schedule III to state the date and hour of the delivery of the nomination paper to him. We observe that the nomination paper form prescribed in schedule II of the Ballot Act in England altogether omits the date of the candidate's declaration, showing that it is not essential.

In the *Calcutta South* (N.-M.U.) in which the candidate had omitted to fill in the date of his declaration the Commissioners held that the omission of the date was a technical irregularity and no more than an unsubstantial departure from the law. We agree with this view, and hold that "subscribed" in rule 11(3) of the electoral rules means signed and does not include dating. We find that the nomination paper of the petitioner was delivered duly completed and subscribed in conformity with the provisions of rule 11(3) of the electoral rules. The invalidation of that nomination paper by the returning officer was, therefore, improper.

We would, therefore, recommend to His Excellency the Governor that the election of the respondent Obedur Rahman Khan should be held void.

CASE No. XI

Almora (N.-M.R.) 1926

PANDIT GANGA DATT PANDE *Petitioner,*

versus

PANDIT BADRI DATT PANDE *Respondent.*

Under Indian electoral law there is no prohibition against processions or banners as in the Corrupt Practices Act (1883) of England.

The corrupt practice defined in section 2 (a) (ii) of the first schedule of the Corrupt Practices Order, 1936 is not committed unless there is a threat of spiritual censure or divine displeasure.

A chairman and a secretary of a district board are not precluded from taking an active part in a council election, and acting as polling agents for a candidate. There will always be the question of fact whether the chairman acted in such a way that some voter ceased to be a free agent in giving his vote.

THIS election took place on November 26, 1926. The respondent, Pandit Badri Datt Pande, was returned by a large majority, polling 10,583 votes against 3,803 cast for his opponent, Rai Bahadur Pandit Lakshmi Datt Pande. The petition was not presented by the unsuccessful candidate, but by his brother, Pandit Ganga Datt Pande, who was an elector in the constituency.

The first charge was that the respondent arranged processions, and that they actually took place, the object being to "waylay and engulf the voters while going to the polling stations. It is admitted by the respondent that processions took place, though he disclaims having organized any. We are prepared to find on the evidence that they did take place and that the respondent or his agents took part in them. But there is no evidence that any voter was 'waylaid or engulfed', and processions or banners in themselves are not illegal. There is no provision in the Indian electoral law corresponding with section 16 of the Corrupt Practices Act of 1883 of England".

The second charge was that the respondent was represented as "Sakshat Badri Bishal" (Badri Bishal incarnate)—a term commonly applied to the god installed in the temple of Badri Nathji in the Tehri State. "But from this it cannot be argued that thereby the writer intended to induce a candidate or voter to believe that he will become or will be rendered an object of divine displeasure or spiritual censure as required by sub-clause (b) of clause 2 of part I, schedule V.¹ The argument that the respondent was being deified in order to create an impression that in case the voters went against him they would incur his displeasure also does not appear to be correct, as in order to influence a person by a religious threat it is necessary to invoke some destructive deity, which the god installed in the temple of Badri Nath is not.

"The verses published in the 'Shakti', dated November 9, 1926, that 'those who through greed or compulsion will elect a slave *ji huzur* as their member will be drowned in the ocean of misfortune' mean no more than that innumerable misfortunes will befall those who would elect such a person as their member, and there is no threat of spiritual censure or divine displeasure therein.

"The verses published in the issue of November 16, 1926 are more political than religious, and there is no such threat in them as is contemplated by the sub-clause referred to. The practice of representing the public (*janta*) as a goddess is not uncommon, and it cannot be argued that by reading the verses in question any literate person could be made to believe that any deity was in fact thereby intended. On behalf of the

¹ Section 2 (a) (ii) of first schedule of Corrupt Practices Order, 1936.

petitioner it has also not been argued, much less proved, that any of the readers of the verses in question were misled by them "

• The next charge was that Pandit Har Gobind Pant, the chairman, and Mr. Victor Mohan Joshi, who had been secretary to the district board of Almora, which district board controls labour and employs a large staff, issued leaflets and posters, and that they and some of their subordinates canvassed for votes for the returned candidate, with the knowledge or connivance of respondent or his election agent, and that this affected the election of Rai Bahadur Pandit Lakshmi Datt Pande. The Commissioners in this say :—

" It is to be noted that there is no actual allegation that either the chairman or the secretary put pressure on the employees of the district board, or took any action which would have been objectionable in a private person. The contention is that it is not right for the chairman or for the secretary of a district board to take an active part in a Council election at all. This contention finds support in some remarks contained in the report of the *Bareilly City* petition (see page 132). The facts found in that case were :—

' Babu Jia Ram, the chairman of the municipal board, was an enthusiastic supporter of the respondent. He canvassed for him, spoke at election meetings for him, and on the election day was present at the Town Hall polling station more or less continuously from 10 o'clock till 4 o'clock taking an active interest in the voting and sending messengers to fetch voters.'

" It was held that this conduct constituted an abuse of influence, and was open to criticism as interfering indirectly with the free exercise of electoral rights. In the case before us it is admitted that Pandit Har Gobind Pant, the chairman of the district board, was an enthusiastic supporter of the respondent's candidature, and that he delivered speeches, issued leaflets and acted as a polling agent at one of the polling stations. So far the two cases might appear to be on all fours, but in reality the facts of the Bareilly election were widely different from the case now before us. No evidence has been offered that either the chairman or the secretary used his official position to bring any pressure upon the employees of the district board. On the contrary, the chairman issued a strict order forbidding the employees of the board to take any part in the election. This order is dated November 1, and it was a spontaneous act on the part of the chairman, for the Government circular on the subject did not reach him until later. It was not only communicated to the staff in the ordinary way, but was also published in a newspaper. There is the evidence of Lala Moti Ram Sah, who was at that time sub-deputy inspector of schools in Almora, but who is no longer under the

control of the Almora district board, because he is deputy inspector of schools of Naini Tal. He proves that the instructions were actually communicated to the employees of the board. He identifies the signatures of the clerks of the district board office on the circular. In the month of November, when the election took place, the witness inspected 24 schools, and in all he found that the instructions had been received. Moreover, if the chairman had wished to bring pressure upon his subordinates, he was hardly in a position to do so. In Bareilly city the chairman was supported by a majority of the members belonging to his own political party, and the whole force of the municipal board organization was directed to supporting the Swarajist candidate. But in the Almora district board it is in evidence that, out of 24 members, ten were supporters of the unsuccessful candidate, and only eleven were in favour of the respondent. Out of the ten, one was the chairman of the education committee, and another was the chairman of the public works committee. Both of these acted as polling agents on behalf of the unsuccessful candidate. No doubt the chairman has certain powers which he can exert without the consent of the board, but the chairman has gone into the witness-box, and has told us that he refrained from using these powers. His method was to lay all matters before the sub-committees concerned and then before the full board.

“ The facts, therefore, are quite clear. The allegations in the petition are admitted by the respondent, and the proof offered does not carry us beyond what had been admitted. The question, therefore, is whether a chairman and a secretary of a district board are precluded from taking an active part in a council election and acting as polling agents for a candidate.

“ When the question is put in this form, there is little difficulty in answering it. The chairman of a district board is a citizen, and every citizen is entitled to take part in an election, unless there is some law which prohibits him from doing so. The chairman or the secretary of a district board can be elected as a member of the Council. In the late election no less than twelve chairmen of district boards stood for election. If he is himself a candidate, he can canvass freely on his own behalf. The *Bareilly* report to which we have referred is dated June 30, 1924. The same Commissioners, on the same day, made a report on the *Muttra* petition. In *Muttra*¹ the respondent, who had been elected, was himself chairman of the Muttra district board. Yet the Commissioners reported in favour of his election. In that case, moreover, the secretary of the district board had written articles in a newspaper in favour of the candidate returned. This conduct was considered to be proper. Mere participation in the election cannot amount to undue influence, for, according

¹ I.E.P. II. 194.

to the definition in the schedule, there must be 'interference or attempt to interfere with the free exercise of any electoral right' (schedule V, ~~part~~ I, rule 2). Electoral rights are possessed only by candidates and by voters (rule 30 C). It is necessary, therefore, that the freedom of a voter should be interfered with. The question will always be one of fact, whether the chairman acted in such a way that some voter ceased to be a free agent in giving his vote. If the *Bareilly* report lays down that active participation in a Council election by a chairman is in itself undue influence, then that is a proposition of law which we cannot accept. There must be particulars, or at least evidence, proving that he interfered with the freedom of voters. But, as we have said, the facts in the *Bareilly* case are widely different from the facts of the case now before us.

The result is that we find that the election is not liable to be declared void, and that the respondent was duly elected. We recommend that the petition of Pandit Ganga Datt Pande be dismissed, and that he be directed to pay the costs of the respondent which we assess at Rs. 1,053-12-6.*

CASE No. XII
Ambala Division (N.-M.) 1930
(INDIAN LEGISLATIVE ASSEMBLY.)

RAI BAHADUR PANNA LAL *Petitioner,*

versus

RAI SAHIB PANDIT HARI DAS *Respondent.*

Though meticulous accuracy need not be insisted upon, it is necessary, in filling up a nomination paper, to comply substantially with the provisions of the footnote in the form, in describing the constituency.

The addition of the word "Urban", though redundant, could not mislead anyone and may therefore be ignored as the variation is trivial and immaterial.

Semble—where several nomination papers were submitted by the same candidate for scrutiny and one was held to be correct there is no need to discuss other possibly faulty nominations.

On the 11th of August, 1930, the nomination papers of the candidates for the Ambala Division non-Muhammadan constituency for the Legislative Assembly were scrutinized by the returning officer. The nomination papers presented on behalf of two candidates Rai Bahadur Panna Lal, the present petitioner, and L. Anant Ram, were rejected by the returning officer. A third candidate L. Jai Dev withdrew. Accordingly the respondent R.S. Hari Das being the only validly nominated candidate was declared to be duly elected.

An election petition has been presented by Rai Bahadur Panna Lal, and we have been appointed by the Governor-General as Commissioners to enquire into the petition and report.

In his petition Rai Bahadur Panna Lal urged that the ten nomination papers filed by him had been wrongly held to be invalid by the returning officer. Certain charges were also made in a note appended to the petition regarding the conduct of the returning officer. As the returning officer cannot be made a party to these proceedings and the charges were in our opinion irrelevant to the enquiry before us, we have not dealt with them and refused to allow any evidence to be produced on this point.

The only issue for discussion, therefore, is "whether the election of the respondent is void owing to the improper refusal of all or any of the nomination papers?"

The petitioner presented no less than ten nomination papers.

In the objections filed by Mr. Nanak Chand it was expressly stated that no question of the identity of the candidate R.B. Panna Lal arose. The identity of the various proposers or seconders does not appear to have been called in question. It appears that the returning officer rejected the petitioner's nomination papers on the ground of failure to comply with the provisions of rule 11(3).

One objection common to all was taken before the returning officer and was accepted by him, though apparently he did not attach any weight to it. The objection was that the signature of the candidate Panna Lal, R.B. was not in correct form. Before us this contention was not pressed and obviously has no force, the abbreviation R.B. for Rai Bahadur being perfectly intelligible.

The remaining objections vary as the various nomination papers vary in the manner in which they were filled up. The principal allegations are that the nominations were invalid as the constituency was wrongly described and the description of the proposer and seconder was incomplete. The name of the constituency as given in schedule (1) at page 29 of the Legislative Assembly rules is Ambala Division (non-Muhammadan). It is correctly given in the first line of all the nomination papers but in the 7th line, viz. "Constituency on the electoral roll

of which the candidate is registered as an elector " various entries occur, viz. :—

Ambala city non-Muhammadan in numbers (a), (b), (g) and (h).

Non-Muhammadan Ambala city urban (c) and (d).

Ambala Division non-Muhammadan urban (e).

Ambala Division non-Muhammadan constituency (i).

It will be convenient to consider first the two papers 2/e and 2/i.

As regards 2/i the constituency is rightly described therein and the sole question is whether this nomination paper has been rightly rejected on other grounds. The returning officer held that " Even nomination paper marked 2/i in which description of the seconder is not complete and in which the signature of the proposer also is not identical with his name shown in the electoral roll is also invalid ". The proposer's name is given as Ganga Ram Rai Sahib and his signature appears as Ganga Ram. We are not prepared to hold that the mere omission of the words " Rai Sahib " after his signature renders it invalid. It is not obligatory that the signature should be in exactly the same form as the entry in the electoral roll as long as the identity of the signatory is clear (*Cf.*, *Midnapore South* (N.M.R.)). A more serious objection, however, is to be found in the fact that the number of both the proposer and seconder in the electoral roll of the constituency is not fully given. The only entry as regards the proposer is " no. 145, ward 3 " and as regards the seconder " no. 127, ward 3 ". Now the footnote to nomination papers directs that " where the electoral roll is subdivided and separate serial numbers are assigned to the electors entered in each subdivision a description of the subdivision in which the name of the person concerned is entered must also be given here ".

The Ambala Division non-Muhammadan constituency covers the whole of the Ambala division. The electoral roll, therefore, is subdivided into a number of parts some of which have been produced before us. It is clear, therefore, that to comply substantially with the provisions of the footnote it would be necessary to specify the portion of the electoral roll in which these numbers occur. Mr. Barkat Ali has argued that as long as there is no doubt of the identity of the proposer and seconder, which he urges could easily be ascertained by the returning officer making a summary enquiry, there is no need to insist on meticulous accuracy. He cites in this connection (*Palamau* N.M.R.) in which apparently the Commissioners considered that as full details of the petitioner-candidate were given in the nomination form he could easily be identified therefrom and it was unnecessary to insist on the electoral roll subdivision being given in addition to the number. The present case, however, can be distinguished as the objection is with regard to the proposer and seconder as to whom full details do not appear in the nomination form. The object of the proviso is clearly to enable the

returning officer and any other persons either candidates or electors who happen to be interested to identify readily the proposer and seconder. We are of opinion that although meticulous accuracy need not be insisted upon, it is necessary in such circumstances to comply substantially with the provisions of the footnote and we agree with the view of the Commissioners expressed in *Punjab North-East Towns* (non-Muhammadan) in which it was held that a mere entry "no. 549, ward no. 5" was not a sufficient compliance to validate the entry. It is interesting to note that the petitioner in that case was the present petitioner. In our opinion, therefore, nomination paper 2/i was rightly rejected.

With regard to nomination paper no. 2/e this has not been considered separately by the returning officer in his somewhat summary order. In fact every one at the time of scrutiny appears to have overlooked the fact that in this nomination form the description of the constituency in line seven differs from the description in the remaining eight forms.

A very feeble attempt was made to argue that as the returning officer has not referred to this nomination paper 2/e specifically it could not have been in its present form when before him. The entry, however, in line seven of Ambala Division non-Muhammadan urban shows no signs whatever of either addition or alteration and the nomination paper bears an order of rejection signed by the returning officer. There is not the least doubt in our opinion that the nomination paper exhibit 2/e is the original and genuine nomination paper that was filed before the returning officer.

The description here given is "Ambala Division non-Muhammadan urban". This is in our opinion a perfectly satisfactory description of the constituency. It is argued that as under rule 6 of the Legislative Assembly electoral rules the candidate may be entered in some electoral roll other than that of the constituency for which he is standing, it is necessary that the words "Legislative Assembly" should appear. We consider it unnecessary that the words "Legislative Assembly" should be added as it is clear from the nomination paper as a whole that the candidate is standing for the Legislative Assembly and there is no other constituency except that for the Legislative Assembly which bears the name of Ambala Division non-Muhammadan.

The word "Urban" is merely redundant. It is argued that for the Legislative Assembly there is no distinction between urban and rural constituencies, whereas for the Punjab Legislative Council there are such different constituencies and therefore confusion might arise. The constituency of the Punjab Legislative Council, however, in which Ambala city falls is known as North-East Towns non-Muhammadan and this could not possibly be confused with Ambala Division non-Muhammadan urban. Such a defect could not mislead anyone

Similar defects were ignored in *Madnapore South N.-M.R.* In our opinion the word "urban" is redundant and may be ignored as the variation is trivial and immaterial (*Cf., Bengal East*). We are, therefore, of opinion that this nomination paper is in order as regards the description in line seven.

In this paper in the case of the proposer and seconder in addition to the serial number and the number of the ward the electoral roll is given as Ambala city non-Muhammadian. It is contended that this is an insufficient description. Mr. Nanak Chand has argued that it should be specified in addition that the electoral roll is that for the Legislative Assembly and forms part of the electoral roll of the Ambala tahsil and the Ambala district. This we consider is going too far. The note to the nomination form merely provides that the subdivision of the electoral roll has to be given. In the present case there is a joint roll for both the Legislative Assembly and the Punjab Legislative Council. Voters who are entitled to vote in both constituencies have separate serial numbers in each constituency as given in columns 2 and 3 of the electoral roll. The electoral roll itself is headed: Community (kaum) non-Muhammadian, District Ambala, Tahsil Ambala, Town Ambala city. In our opinion the words "Ambala city non-Muhammadian" are a sufficiently full description of the subdivision of the electoral roll.

We are, therefore, of opinion that this nomination paper was in order and was wrongly rejected by the returning officer.

As regards the remaining eight nomination papers, the question of whether there has been sufficient compliance with the rules and regulations for filling them up is not free from difficulty. We will not, however, discuss this in view of the finding we have reached regarding the nomination paper exhibit 2/e.

We, therefore, report that in our opinion the nomination paper for the petitioner Rai Bahadur Panna Lal marked exhibit 2/e was wrongly refused and that, therefore, the election of the respondent should be declared void.

As regards the question of costs, we recommend that in view of the carelessness with which the nomination papers of the petitioner were filled in he be left to bear his own costs with the exception of such costs as were incurred by him in summoning witnesses in consequence of the objection raised and subsequently dropped by the respondent. These costs amount to Rs. 115.

CASE No. XIII
Amritsar City (M.) 1924
(PUNJAB LEGISLATIVE COUNCIL.)

SHEIKH MUHAMMAD SADIQ *Petitioner,*

versus

MIAN MUHAMMAD SHARIF *Respondent.*

It is not necessary for a polling agent to be given a written authority. It is sufficient to establish *de facto* agency if the evidence proves that a person acted on behalf of a candidate at the polling booth "with his knowledge and consent". Agency has to be inferred from the circumstances and the conduct of the parties.

One case of personation procured by an agent is sufficient to avoid the election.

The wages of persons in the service of a candidate who are put on election work should be shown in the return of election expenses

It is not allowable to amend the list of particulars by including fresh instances of a similar kind. Further details may be given with regard to the instance referred to in the original list

THE petitioner seeks to avoid the election on the grounds set forth in detail in his petition, which was published in the *Punjab Gazette*, dated 22nd February, 1924. The petitioner's main allegations are that the nomination paper of respondent no. 1 was invalid on account of certain irregularities and omissions, and that respondent no. 1 and his agents have been guilty of the corrupt practice of procuring "personation" under part I of schedule V of the electoral rules. The petitioner also challenges the correctness of the return of expenses filed by respondent no. 1, and claims the seat for himself on the ground that he secured the highest number of votes next to him.

Khawaja Ghulam Yaseen, who was made a *pro forma* respondent, did not put in appearance. Respondent no. 1 (hereafter referred to as respondent) denied the petitioner's allegations, and filed a recriminatory petition containing counter-charges against the petitioner. The latter was, however, withdrawn at a subsequent stage.

Several of the charges in the original petition had to be struck off for want of adequate particulars, while others were abandoned at the time of arguments after a half-hearted and infructuous attempt to substantiate them. The petitioner applied for permission to amend his petition by introducing certain fresh charges of personation, but the application was disallowed for reasons given in our order, dated 12th April, 1924, a copy of which forms an annexure to this report. The only pleas or charges that were put in issue and eventually pressed before us were those given below, and it will be sufficient for the purpose of this report to confine ourselves to the same :—

- (a) That the nomination paper of the respondent was invalid, and its improper acceptance by the returning officer renders the election void ;
- (b) That Fazal Hussain, the polling agent,—(or, at any rate, an agent)—of the respondent procured the "personation" of a voter named Muhammad Ibrahim in ward no. 12, and this was done with the knowledge and connivance of the respondent ; and
- (c) The return of expenses filed by the respondent was false in material particulars.

As regards (a), there is no doubt that there are several omissions and irregularities in the nomination paper, some of which, at any rate, cannot be considered to be altogether immaterial. But objections were raised before the returning officer, and the nomination paper was accepted by him after satisfying himself as regards the same. Under the circumstances, we consider it preferable not to dispose of this petition on the technical objections relating to the nomination paper, especially as we

are clearly of opinion, that the petitioner must succeed on merits on the other two charges specified above. We, accordingly, proceed to discuss the latter charges.

The factum of "personation" in the case of a voter named Muhammad Ibrahim in ward no. 12 has been proved beyond any doubt, and was rightly not disputed by the learned counsel for the respondent at the time of the arguments. There is ample evidence on the record to show that the name of Muhammad Ibrahim (P.W. 10) was wrongly entered twice in the electoral roll, viz. in ward no. 4 and ward no. 12; that Muhammad Ibrahim voted in ward no. 4 and not in ward no. 12, and that some other persons voted for him in the latter ward. The petitioner believed that one Barkat Ali of Gujranwala (P.W. 39) had personated Muhammad Ibrahim. Barkat Ali denied having done so, but the petitioner's allegation has been proved to be correct by the testimony of the Finger-Print Expert. At the time Barkat Ali personated Muhammad Ibrahim, the vote was challenged by an agent of the petitioner. Barkat Ali was, however, identified by one Fazal Hussain on behalf of the respondent as the right voter and then the vote was allowed to be recorded. Barkat Ali's thumb-impression was taken at the time on the list of challenged votes, and the Finger-Print Expert has found this impression to correspond with his thumb-impression taken before us. The thumb-impression on the counterfoil of the corresponding ballot-paper was unfortunately not clear enough for comparison, but, so far as comparison, was possible, it appeared to correspond with that of Barkat Ali.

The petitioner's allegation is that Fazal Hussain, who identified Barkat Ali as the right voter, was a partner of the respondent and was acting as his polling agent on the polling day. This allegation is denied by the respondent. According to the respondent, Fazal Hussain, had gone to Calcutta on business for a couple of months and returned to Amritsar only two days before the polling. He never worked as an agent of respondent and was not authorized to act as polling agent. The respondent professes to be ignorant as to who identified Barkat Ali as the real voter, when he was personating Muhammad Ibrahim, and claims immunity from the consequences of the "personation", on the ground that neither he nor any of his agents was, in any way, responsible for it. Fazal Hussain (P.W. 14), who was examined as a witness, supports the above allegations of the respondent. He admits that he went to the polling station and voted for respondent, but denies having worked for him as an agent either before or on the polling day.

The list of challenged votes (exhibit P-14-A) shows clearly that one Fazal Hussain, son of Maula Bux, of Katra Farid Chauk, identified the person, who voted as Ibrahim (*alias* Muhammad Ibrahim) in ward no. 12. The presiding officer, Kartar Singh (P.W. 8), was unable to identify Fazal Hussain, owing to lapse of time, as he was not personally

acquainted with him. But Maqbul Ahmad, Assistant District Inspector of Schools (P.W. 7), who was working as a polling officer at the same polling station and who also saw Fazal Hussain identifying some challenged voters, was acquainted with him and has described him as a skin-merchant of Amritsar city. Unfortunately, Fazal Hussain was not present at the time when this witness was examined, but there is no suggestion in his cross-examination that the person named by him might be other than Fazal Hussain, the partner of respondent (P.W. 14). Fazal Hussain was, however, present in court when Manohar Lal (P.W. 19), Excise Sub-Inspector—another polling officer—was examined, and he identified Fazal Hussain and deposed that Fazal Hussain was working for one of the candidates Diwan Ali, Patwari (P.W. 22), who was giving "parchis" to the voters at the same polling station, also identified Fazal Hussain and stated that he was bringing voters to the polling booth and was present throughout the day.

The disinterested testimony of the above officials at the polling station is further supported by the evidence of respectable witnesses like Sheikh Ali Bux, Honorary Magistrate (P.W. 4), Abdul Majid, vakil (P.W. 5), Mirza Qamar Beg (P.W. 17), record-keeper in the office of the District Judge, Amritsar, and Gopal Das, import merchant (P.W. 20). Sheikh Ali Bux (P.W. 4) clearly deposes that Fazal Hussain (whom he identified in court) was at the polling station and was helping the respondent. This witness voted for the respondent and cannot be suspected of any partiality to the petitioner. M. Abdul Majid, vakil, saw Fazal Hussain taking voters to the polling booth and asking people to vote for the respondent. Mirza Qamar Beg, who voted for the third candidate, Khawaja Ghulam Yaseen, and seems to be a disinterested witness, deposes that he saw Fazal Hussain identifying certain challenged voters. This witness knew Fazal Hussain, and identified him in court also. Gopal Das (P.W. 20) was present at the polling station merely to watch, as he was going to act as an election agent for a candidate for the Legislative Assembly. He also saw Fazal Hussain identifying certain voters, who were challenged by an agent of the petitioner.

In reply to the overwhelming evidence produced by the petitioner, the respondent has produced only two witnesses in defence, both of whom are his agents and partisans. These witnesses depose that they were asked by the respondent to go to the polling stations on his behalf, and that Fazal Hussain did not work for respondent either on the polling day or before. These witnesses, however, knew nothing about the challenged votes. They have deposed that they did not remain continuously at any particular polling station—a conveniently evasive statement, obviously intended to enable the witnesses to escape from possible consequences of any corrupt practices, that might be held to be proved. If these persons were really working for the respondent, it is

difficult to believe that they would have remained ignorant of the challenged voters or that they would have allowed any unauthorized person to identify such voters. It must be remembered that four different voters were challenged on the polling day. On each occasion the challenge must naturally have led to an inquiry, and the fact could not be expected to remain unknown to persons interested in or working on behalf of the respondent.

The allegation that Fazal Hussain had gone on business to Calcutta and had returned only a couple of days before the polling day cannot also be believed. Had there been any truth in this allegation, the respondent could easily have produced documentary proof, e.g. in the shape of letters written by or to Fazal Hussain, or accounts of expenses in connection with his journey to Calcutta and his stay there. But no attempt has been made to produce any such proof. Fazal Hussain was admittedly a partner of the respondent for some seven years. He is evidently a man of some influence, as his firm pays income-tax to the extent of about Rs. 8,500.* It was, therefore, only natural that he should have helped the respondent in his election campaign. Fazal Hussain is a resident of ward no. 12 and was very probably well-acquainted with the voters of that ward. It appears that he noticed that the name of Muhammad Ibrahim was entered as a voter in his ward by mistake and arranged to get Barkat Ali to personate him. Fazal Hussain originally came from Gujranwala, and it is significant that Barkat Ali, the personator, belongs to the same place. Fazal Hussain deposes that he went to Gujranwala for a few days just before the polling. It seems very likely that he went there to procure personators.

In view of the evidence discussed above, we feel no hesitation in holding that Fazal Hussain helped the respondent by canvassing before the polling day and by taking voters to the polling booth and identifying them on the polling day. The question whether he was given a written authority as a polling agent or not is not material. Kartar Singh, the presiding officer (P.W. 8) has deposed that he was shown a written authority by Fazal Hussain, and there is no reason whatever to disbelieve his statement. But apart from the written authority, there is no room for doubt that he was acting as a *de facto* polling agent, and in view of his close connection with the respondent and our finding that he was also canvassing for him we feel no doubt that he must have acted on behalf of the respondent at the polling booth, "with his knowledge and consent".

The facts proved above are sufficient to constitute "agency". The term "agent" has a wide significance in election law, and it has been defined to include "any person who is held by the Commissioners to have acted as an agent with the knowledge or consent of the candidate" (*vide* rule 30, Punjab electoral rules). No authorization or declaration

in writing is necessary, and "agency" has to be inferred from the circumstances and the conduct of the parties. (See *Wigan* case 4 O'M. & H., 10.) We have found that Fazal Hussain did canvassing for the respondent and led and identified voters at the polling booth. These facts have been held to be sufficient to establish agency (*Cf. Rogers' On Elections*, 19th edition, volume II, pages 601 and 605).

We accordingly find that Fazal Hussain was an agent of the respondent, and was guilty of the corrupt practice of procuring personation.

There is no evidence on the record to prove that the respondent had any knowledge of the corrupt practice, but the procuring of personation, even by an agent, falls under part I of schedule V of the Punjab electoral rules and is sufficient to render the election of the returned candidate void, see rule 44(b).¹

Although only one instance of personation has been established, we are unable to take the case under rule 44, clause (2), as the respondent has made no effort whatever to show that the conditions of that clause were fulfilled. He has produced no evidence that he had taken any precautions or issued any instructions to his agents with a view to prevent commission of corrupt practices. The evidence of one of his agents (Ghulam Hussain, R.-W. 2), on the other hand, gives the impression that respondent was rather negligent in the matter. According to this witness, the respondent took no steps to appoint his representatives to attend at the polling stations till the evening before the polling day, and even then gave them no instructions as regards their duties. If the respondent was content to leave his agents to conduct themselves in such manner as they chose he cannot escape the consequences of their doings.

We have next to deal with the return of expenses filed by the respondent. The petitioner's main contention in respect of the return is that it does not include various items of expenditure incurred by the respondent in connection with his election, viz. —

- (1) Cost of certain posters issued in favour of the respondent ;
- (2) Cost of petrol ;
- (3) Cost of stationery ;
- (4) Rent, wages, etc. in connection with the tents, etc. pitched for voters near the polling booth ; and
- (5) Pay of the election agents.

The return shows no expenditure whatever under (2), (3), (4) and (5). The explanation offered is that very little stationery was used, and that it was taken from the respondent's shop. The respondent states that he did not, as a rule, go in his motor for canvassing purposes,—

¹ Section 3 of first schedule of Corrupt Practices Order, 1936, read with paragraph 7 (1) (b) of part III of the same.

though he may have at times done some canvassing, when he went out in his car on other business. The tents pitched near the polling booth are said to be the property of the respondent, and it is stated that the men from his factory did the work of pitching the tents without any extra wages. Abdul Rahman Butt, the election agent of the respondent, is an employee of the respondent, and is said to have worked as an election agent without any extra remuneration.

The above explanation is by no means convincing. It is difficult to believe that Abdul Rahman Butt, and all other employees of the respondent worked for him in the election without extra remuneration in some form or other. It is also unlikely that a man in respondent's position and possessing a car should not have used his car for canvassing purposes. The petitioner has produced some witnesses who depose that the respondent did go about in his car for canvassing and the respondent has merely tried to get out of the difficulty by stating that he did canvassing occasionally when he went out for other business. As regards stationery, too, a fair amount must have been required. We think the respondent ought to have shown in his return all expenses in connection with his election, big or small, and the explanation that certain articles were taken from respondent's shop or house cannot be considered satisfactory. We also consider that if any men in the service of the respondent were put on election work, their wages for the period should have been shown in the return. (See *Hartlepool* case 6 O'M. & H., 5.)

The explanation offered with respect to item (1) above is still more unsatisfactory. The respondent admittedly issued some posters from time to time during the course of his election campaign. A voucher for Rs. 117 paid to the *Vakil* Press in connection with the printing has been attached to the return of expenses; but the voucher does not include some of the posters issued in respondent's favour. Respondent's explanation is that these posters were issued by other persons without his knowledge; but this explanation does not seem reliable. For the manager of the *Vakil* Press, who was examined as a witness by the petitioner and was called upon to produce his accounts, has deposed that the respondent paid Rs. 60 and Rs. 81-4-0 on 29th November and 13th December, 1923, in connection with printing work, i.e. Rs. 141-4-0 in all. It was suggested that some of this work may have been in connection with the private business of the respondent. The respondent was, however, examined on the point and was unable to show from his account-books that any printing charges were paid in connection with his business on the above dates. The sum of Rs. 141-4-0, referred to above, was paid during the election days. It is, therefore, only reasonable to conclude that the voucher for Rs. 117 does not include all the charges of printing work done in connection with the election. The mere fact that the posters were issued over the signatures of other persons cannot be

accepted as proof of the printing charges having been paid by those persons. One Fazal Hussain (P.W. 49) has deposed that he got a circular printed in favour of the respondent at his own expense, but we do not consider his evidence reliable. The evidence of Abdul Rahman Butt, the election agent, shows that the poster (exhibit P. 30) is included in the voucher for Rs. 117, though this poster purports to have been issued by one Abdul Aziz of Katra Bagh Singh. Abdul Rahman further deposes that exhibit P. 29 was printed by him and this poster also was issued in the name of a third person, viz. M. Abdul Qadir. Qazi Abdul Hamid, a signatory of another poster (P.W. 47) deposes that he signed the poster merely because some one brought it to him on behalf of the respondent and that he did not pay for the printing. In view of all these facts, we hold that the item of Rs. 117 in the return does not represent the real expenditure incurred by the respondent in connection with printing.

There are other facts in evidence which show that the respondent and his election agent did not keep proper accounts, and that the return of expenses cannot be looked upon as reliable. Abdul Rahman, respondent's election agent, has produced an account-book (exhibit P.W. 38-A.) which could not in any sense, be considered regular or to fulfil the requirements of electoral rule 21. According to this rule, the election agent has to keep separate and regular books of account and enter therein all the particulars of expenditure, which are eventually to be shown in the return of expenses. Abdul Rahman does not appear to have kept any daily account. The account produced consists of entries on four pages, and from their appearance these entries seem to have been made at one and the same time subsequently. The account-book shows that Rs. 500 were taken by Abdul Rahman from the respondent for election expenses on 10th October, 1923, while the return of expenses shows that only Rs. 377-15-6 were taken in smaller sums on different dates, viz. Rs. 105 on 21st October, 1923, Rs. 19 on 25th November, 1923, Rs. 252 on 27th November, 1923, and Rs. 1-15-6 on some other date, which has not been specified. On another page the payments made for copies of electoral rolls are shown. No dates are given except in one instance, and that date (11th October, 1923) does not agree with any of the dates given in the voucher. The total expenditure in the account-book is given as Rs. 477-15-6, while in the return it is shown as Rs. 377-15-6. This cannot be treated merely as a mistake in totalling, for the election agent is careful enough to note in the account-book at the end that a sum of Rs. 22-0-6 (Rs. 500—Rs. 477-15-6=Rs. 22-0-6) was returned to the respondent. The respondent, on the other hand, deposed that out of the sum of Rs. 500 given by him to the election agent a sum of Rs. 200 was returned to him. It is also curious that neither the sum of Rs. 500 nor the sum of Rs. 200 (or Rs. 22-0-6) said to have been returned to the

respondent appears anywhere in his own account-books. The account-books show that 3 or 4 clerks were employed on election work at Rs. 35 per mensem. The employment of these clerks suggests that there must have been a good deal of clerical work, and it is surprising that no expenditure for stationery is shown in the return. The respondent has explained that the clerks merely went round from time to time to remind voters about voting for him, but the explanation seems absurd and unreliable.

The above facts do not require any comment. They show beyond any doubt that the rule requiring regular accounts of election expenditure has been flagrantly disregarded by the respondent and his election agent, though they carry on extensive business and know how to keep accounts. Consequently, the return of expenses, based upon such accounts as have been produced by the election agent in this case, cannot be accepted as reliable. In view of the evidence discussed already, we hold the return to be false in a material particular, viz. the printing charges in connection with posters, circulars, etc. issued in connection with the election.

It is true that no maximum has yet been prescribed in India for the expenses which can be incurred by a candidate. But the absence of such a maximum does not relieve a candidate from the necessity of compliance with the rule. The election expenses afford a useful check on the methods employed in the conduct and management of an election, and the matter cannot be treated lightly. It has been recently held in England that an election court might avoid an election if the return of expenses has been carelessly prepared, even if no corrupt intention is proved. (See Hammond's Indian Candidate and Returning Officer, pages 79-80.) According to the Indian rules a false return of expenses by itself is not sufficient to avoid an election. But, we have to report that the respondent as well as his election agent, Abdul Rahman, have incurred the disqualification, referred to in rule 5(4) of the Punjab electoral rules.

We have accordingly to report under rules 44 and 45 that the respondent no. 1 was not duly elected inasmuch as his agent Fazal Hussain was guilty of the corrupt practice of personation falling under part I of schedule V of the Punjab electoral rules. Fazal Hussain has incurred the disqualification referred to in rules 5 and 7 of the same rules.

We award the petitioner Rs. 750 as costs against respondent no. 1. The costs may be deducted from the security of Rs. 1,000 deposited by respondent no. 1 in connection with his recriminatory petition.

(ANNEXURE TO THE REPORT)

Order.—The petitioner in this case has applied for permission to amend the list of “corrupt practices” attached to his petition by including

therein certain other instances of alleged corrupt practices which were subsequently brought to his notice ; and which are shown in the list B, accompanying his application, dated 10th March, 1924. Instead of paragraph 1 of the original list which refers to one case of personation of a voter, the petitioner now wants to substitute paragraphs 1 to 1(F) of list B, giving several such instances. There are also certain other instances of corrupt practices of a different type included in list B, but these were given up at the time of arguments, and need not, therefore, be discussed.

On behalf of respondent no. 1, it was contended that the amendment sought is not permissible under the electoral rules. A preliminary issue was struck on this point, and arguments have been heard.

Counsel for the petitioner has tried to justify the proposed amendment on the ground that paragraph (5) of the petition clearly mentions that a very large number of persons recorded votes in favour of respondent no. 1 by falsely personating as proper voters, and that, therefore, the amendment does not introduce any new charge, but only fresh instances. He has cited certain English decisions (*vide inter alia* the decisions cited on pages 218-9 of the law of Parliamentary Elections and Elections Petitions by Fraser, 3rd edition) in support of his argument. There is no doubt that in some of the reported cases in England considerable latitude seems to have been given in the matter of amendment. But we consider it unnecessary to discuss these cases so far as the present issue is concerned, as it is not disputed before us, that the procedure in England in this respect is different and is not governed by the same rules as those which obtain in India. The present application is for amendment of the list attached to the petition, which is prescribed by rule 33 of the Punjab electoral rules (1923). According to clause (2) of this rule, the petitioner is required to give full particulars of the alleged corrupt practices in this list. Clause (3) of the rule defines the scope of the amendment of this list, which can be permitted. Clause (3) lays down that the Commissioners may allow the particulars *included in the said list* to be amended or order such further and better particulars in regard to *any matter referred to therein* to be furnished as may in their opinion be necessary for the purposes of ensuring a fair and effectual trial. Now, as already stated above, petitioner has referred to only one instance of personation in paragraph (1) of the list, and by the proposed amendment he seeks to introduce several other instances into the list. We consider that this clearly goes beyond the scope of clause (3) of rule 33. Petitioner can be allowed or required to give further details with regard to the instance referred to in the original list, but we do not think it is open to him now to introduce fresh instances. It would be, in our opinion, straining the language of the rule to hold that the word "particulars" includes fresh instances of a similar kind.

It was urged that a different view as regards the scope of amendment was taken in the *Attock* case of 1920, but the rules then in force were different. In the election rules of 1920, there were no provisions as regards the filing of a list giving particulars of the alleged corrupt practices or the amendment thereof corresponding to clauses (2) and (3) of rule 33. It seems to us that these clauses have been framed with a view to give the earliest possible notice of the charges relied upon to the respondent and to prevent his being harassed by fresh matter being introduced at later stages. Clause (3) permits amendment of list only so far as it may be necessary to give sufficient notice of the charges included in the list to the respondent.

It was finally argued that the amendment should at any rate be allowed under the general provisions of the Civil Procedure Code (*vide* order VI, rule 17). But we do not consider it open to us to fall back upon these provisions, when a specific rule has been framed on the point.

We may add in the end, that even if we had the discretion to allow the proposed amendment, we would not have allowed it in the present case, as the petitioner has shown no good reasons for not including the additional instances in the original list. His application, dated 10th March, 1924, was not even accompanied by any affidavit giving his reasons. An affidavit was presented yesterday, but even that affidavit does not show that the petitioner could not have discovered the additional instances, with due diligence and care, at the time when the original petition was filed.

We, therefore, hold that we can only allow the petitioners to give further particulars with respect to the specific instance of personation referred to in paragraph (1) of the original list.

CASE No. XIV
Azamgarh (N.-M.R.) 1931

(UNITED PROVINCES LEGISLATIVE COUNCIL.)

SHIVA SHANKER SINGH *Petitioner,*

versus

THAKUR MOTI SINGH *Respondent.*

Literal agreement of the description of candidate or proposer with the electoral roll is not necessary. It is sufficient if the nomination papers contain sufficient particulars to identify the persons concerned. An unimportant misdescription does not affect the validity of the nomination.

Though the certified copy of an entry in any electoral roll is conclusive proof of the right of the elector, other evidence is admissible.

THE petitioner Shiva Shanker Singh and the respondents were candidates for the United Provinces Legislative Council, at the last general election, from the Azamgarh District non-Muhammadan rural constituency. The petitioner is registered as an elector in the Ghazipur district. He filed a letter dated August 29, 1930, from the District Magistrate to the returning officer, Azamgarh, along with his nomination papers to establish his identity. He was nominated by means of two nomination papers. Both these nomination papers were rejected by the returning officer on the grounds that the father's name and the address of the petitioner given in the nomination papers did not correspond with those mentioned in the aforesaid letter, or, the certificate as he calls it, and that there was no constituency of the description given in the nomination papers, in the schedule appended to the regulations. The disagreement of the name of the proposer, as signed by him, with that given in the electoral roll was an additional ground for his rejecting the first nomination paper. As the nomination papers of the petitioner were rejected and the respondent no. 2 withdrew his candidature within the prescribed time, the respondent no. 1 was returned unopposed. The present petition has been filed to have the election of the respondent no. 1 declared void on the ground that the nomination papers of the petitioner were improperly rejected by the returning officer and that the rejection materially affected the result of the election.

The respondent no. 1 alone puts in appearance and opposes the petition. The pleadings of the parties have given rise to the following issues :—

1. Are the candidate Thakur Shiva Shanker Singh and his proposer not identical with the persons whose electoral numbers are given in the nomination papers as the numbers of such candidate and proposer ?
2. Is the constituency wrongly described and does that render the nomination papers invalid ?
3. In order to prove the identity was it necessary for the petitioner to produce a certified copy of any entry made in the electoral roll of the constituency, and if so, how does the non-production of a certified copy affect the validity of the nomination papers ?

Issue no. 1.—The father's name of the petitioner given in the nomination paper was "Thakur Dwarka Prasad Singh", while in the aforesaid letter it was mentioned as "Babu Dwarka Prasad Singh". The address of the petitioner as entered in the nomination paper, was "V. and P.O. Rampur, district Ghazipur", and that given in the letter was "Rampur, pargana Khanpur, district Ghazipur". The difference between the two descriptions was that the petitioner's father's name in the nomination paper was prefixed by "Th." (an abbreviation of Thakur)

instead of "B." (an abbreviation of Babu) and it contained "Pd." (a contraction of "Prasad") and in the address the pargana was not given but the letters "V. and P.O." standing for village and post office were prefixed to Rampur, the name of the village. The discrepancy in the description of the proposer was that he signed his name as "Rai Rash Behari Lal" in the nomination paper while the name appearing in the electoral roll against the electoral number given in the nomination paper was "Rai Ras Behari". In the absence of any evidence in this case to show that there were any other persons besides the petitioner and the proposer answering to the description of the petitioner as given in the said letter and that of the proposer as given in the electoral roll against the numbers given in the nomination paper, it does not seem reasonable to hold that the petitioner and the proposer were not identical with the persons referred to in the said letter and the electoral roll for the mere reason that there was no absolute literal correspondence between the descriptions as given in the nomination papers and the said letter and the electoral roll. The inaccuracies in description in this case were merely technical and of no importance. They were not of a nature which could have misled anyone.

The grounds on which a nomination paper can be refused are set out in regulation 9 of the regulation for the election of members to the Legislative Council of the United Provinces. The returning officer is, under sub-clause (1) (IV) of the regulation, the only clause applicable in this case, authorized to reject a nomination paper only in case he has doubts as to the identity of the persons concerned, and even then as provided by sub-clause (1) after such summary enquiry as the returning officer thinks necessary. There is no provision in the regulation requiring that the description of the candidate or of the proposer given in the nomination papers should literally agree with the description given in the electoral roll. The provisions of the regulation are complied with if the nomination papers contain sufficient particulars to identify the persons concerned. The discrepancy in the description in this case as stated above was not such as could have raised any doubts as to the identity of the persons concerned. We might also observe that technical and trifling mistakes of the nature similar to those in this case have been condoned both here and in England.

This issue is therefore decided against the petitioner.

Issue no. 2.—The 7th entry in the nomination paper under the heading "Constituency" on the electoral roll of which the candidate is registered as an elector is "polling station, Khanpur, district Ghazipur, non-Muhammadan rural". The correct name of this constituency was "Ghazipur District non-Muhammadan rural". The addition of the words "polling station, Khanpur" and putting the word "district" before, instead of, after the word "Ghazipur" in the name of the constituency cannot also

be said to be misleading. There could be no room for doubt as to the constituency to which the petitioner intended to refer in this case. For the reasons given above, which equally apply in this case, the misdescription was also of no importance and did not affect the validity of the nomination. We accordingly find that there was a mistake in the description of the constituency in this case but it did not render the nomination invalid.

Issue no. 3.—Regulation 9 (2) (a) provides that the production of any certified copy of an entry made in the electoral roll of any constituency shall be conclusive evidence of the right of any elector named in that entry to stand for election. But it does not provide that the certified copy shall be the only evidence admissible in proof of the matter. The petitioner, has in this case, instead of producing a certified copy of the electoral roll, produced a letter, dated August 29, 1930, from the District Magistrate of Ghazipur to the returning officer, Azamgarh, showing his name, parentage, address, the name of the constituency on the electoral roll of which he was registered as an elector and his electoral number. This letter thus contains all the particulars appearing in the electoral roll necessary to establish the identity of the petitioner and it was as reliable as a certified copy of the electoral roll. We decide this issue also in the petitioner's favour.

On the above findings we hold that the nomination paper of the petitioner was improperly rejected and that the improper rejection of the petitioner's nomination paper has materially affected the result of the election and are of opinion that the respondent no. 1, the only elected candidate in this case, has not been duly elected. We accordingly recommend that the election of Thakur Giri Raj Singh, the respondent no. 1, should be held to be void.

In the circumstances of this case we recommend that the parties do bear their own costs.

CASE No. XV

Balasore South (N.-M.R.) 1927

SITAKANTA MAHAPATRA *Petitioner,*

versus

HAREKRISHNA MAHATAP *Respondent.*

Any entertainment by providing food with the corrupt intention of influencing the voters is a corrupt practice falling within the definition of bribery, if arranged by a candidate or his agent or by any other person with the connivance of a candidate.

The omission of certain items of expenditure from the return of election expenses may raise the presumption that the omitted payments were corrupt. Expenses for entertainment by an agent must be included in the return as having been incurred in the conduct or management of the election.

Vouchers for payments made, e.g. for taxi hire should be obtained and filed with the statement of election expenses.

THIS was a petition to set aside the election of the respondent Babu Harekrishna Mahatap to the Bihar and Orissa Legislative Council for the South Balasore non-Muhammadan rural constituency, which was held on the 30th November, 1926.

The original petitioner Chaudhuri Bhagbat Prashad Samantarai Mahapatra was an unsuccessful candidate for election from the same constituency. A third candidate Babu Mukunda Prasad Das, son-in-law of the original petitioner withdrew his candidature before the election. In the election the respondent secured 3,007 votes as against 567 votes obtained by the original petitioner.

The petition in question was filed on the 22nd of January last. Subsequently the petitioner applied to the election Commissioners for permission to withdraw his petition on the ground of illness. Notice of this application was duly published in the *Bihar and Orissa Gazette*. After hearing the parties, the petition was allowed to be withdrawn. Subsequently an application was filed under the Bihar and Orissa electoral rule 39 (5) (c) by the present petitioner Babu Sitakanta Mahapatra, who was son of the original petitioner, for the substitution of his name as petitioner in the place of his father, on the ground that he was an elector of the South Balasore non-Muhammadan rural constituency. This application was not opposed by the respondent. Eventually after various adjournments due to causes beyond control the prayer for substitution was granted and the case proceeded.

Charges were preferred of undue influence by members of the district and local boards, of intimidation by a polling agent of the respondent, of the publication of false statements, etc. On these points the Commissioners found the evidence to be unconvincing.

The main charge against the respondent was that of treating, the petitioner's case being that voters were fed at three different centres. Regarding this the Commissioners reported as follows :—

The explanation to rule 44(2) of the Bihar and Orissa electoral rules has defined the term "treating" as meaning "the incurring in whole or in part by any person of the expense of giving or providing any food, drink, entertainment or provision to any person with the object, directly or indirectly, of inducing him to vote or refrain from voting or as a reward for having voted or refrained from voting". Under the explanation to clause 1 of schedule V,¹ which deals with corrupt practice of bribery, the term gratification is not restricted to pecuniary gratification

¹ Recent amendments introduced by the Corrupt Practices Order, 1936 allow treating if it takes the form of "customary hospitality which did not affect the result of the election".

and includes all forms of entertainment. Any entertainment by providing food with the corrupt intention of influencing the voters is a corrupt practice falling within the definition of bribery. It is a fundamental principle of law that an election should not be lightly set aside or a person held guilty of corrupt practice unless the evidence is so satisfactory as to leave no room for any reasonable doubt. Mere suspicion should not be the basis of any judgment.

Bearing these principles in mind, let us apply ourselves to the facts of the present case. The evidence as to entertainment in Jai Sahu's shop consists of the testimony of Jai Sahu himself and his brother and of two voters Markanda Sahu and Mukunda Patnaik. This evidence shows that a number of voters were fed at Jai Sahu's shop on the 30th of November by Radhashyam Naik on behalf of the respondent. Jai Sahu struck us as being an independent witness. This oral testimony is corroborated by the entries in the confectioner's account-book (exhibit 8) which purports to contain the signature and initials of one Radhashyam Naik and bears the heading "vote expenses of Harekrishna Mahatap (respondent) under the date 30th November, 1926".

The oral evidence shows that voters were entertained. The entry exhibit 8 shows that 145 persons were fed. According to Jai Sahu some workers for the respondent took tiffin at his shop, and he estimates that some 20 or 30 men were working for the respondent. Eliminating this number we may fairly hold that more than 100 voters were supplied with food in Jai Sahu's shop on the day of election.

This entertainment, in order to fall within clause 1 of part I of schedule V, has to be by a candidate or his agent or by any other person with the connivance of a candidate. The law of agency in election cases goes much further than the ordinary law of principal and agent (*Wigan* case, 4 O'Malley and Hardcastle at page 10). As held in the Indian case of *Kangra cum Gurdaspur*, the term agent has a wide meaning in election law and the relationship has often to be inferred from the facts and circumstances of the case. This view was also taken in the *Hissar* case. Radhashyam Naik is shown in part D of the respondent's return of election expenses as having received some amount on account of travelling expenses. He admits that he was canvasser for the respondent and also that he canvassed for him at the Bhadrak polling station on the polling day. His house is in the jurisdiction of Basudebpur polling station. He came to Bhadrak on the 28th November as the respondent sent for him. He arranged for the refreshment of the voters at a confectioner's shop which, according to respondent's witness no. 2, adjoins the polling station. The respondent admittedly was present at the polling booth at Bhadrak that day. He must have noticed the part played by Radhashyam in providing the refreshment. Radhashyam had an appointment as a spinning teacher under the district board on a small

salary of Rs. 20 per month, and could not have himself paid for the sweets. Taking all the facts and circumstances we cannot but come to the conclusion that Radhashyam acted as an agent of the respondent in the matter.

The next question for consideration is the intention with which this entertainment was provided. It appears that some 100 voters were given entertainment on the polling day close to the polling booth. Applying the maxim that a person must be considered to intend the natural and obvious consequences of his acts, the conclusion is irresistible that all this was done for the purpose of influencing votes or in other words with the intention of producing an effect upon the election. This view receives support from the fact that the expenditure involved is not included in the return of election expenses and the whole transaction is denied both in the written statement and in the evidence on behalf of the respondent. We find that this is a case of corrupt treating by Radhashyam Naik as agent of the respondent.

The remaining item is the feeding at Basudebpur. Banchhandhi Mahanti, the respondent's agent, is charged with this. The petitioner's case is that a number of voters was fed on the 30th November at the dak bungalow at Basudebpur. Banchhandhi Mahanti was admittedly the respondent's polling agent at Basudebpur, and he occupied the district board inspection bungalow (which is also the dak bungalow) on the 29th and 30th November. He himself is a member of the district board and chairman of the Bhadrak local board. He applied in this capacity on the 19th November, 1926 to have both the bedrooms of the Basudebpur bungalow reserved for both the days (29th and 30th) and he remitted the sum of Rs. 2 as rent. On that the chairman of the district board (namely, the respondent) passed an order on the 24th November that the district engineer might be asked to reserve the bungalow. The letter issued shows that only one room of the bungalow was reserved for the 29th and 30th. The visitors' book shows that Banchhandhi Mahanti occupied the bungalow from 7 A.M. of the 29th till 3 P.M. of the 1st December, the last day's occupation being put down as "on duty". The sum of Rs. 2 remitted by him as rent does not appear to have been included in the respondent's return of election expenses. The questions that naturally raise suspicion in one's mind are—why did he seek to reserve the whole bungalow and where was the necessity of such a long occupation? Again although Banchhandhi is charged with the offence of feasting the electors as the respondent's agent, it is significant that he was neither summoned by the respondent nor produced by him to explain away any of these suspicious circumstances arising against him. This suspicion is deepened when it is remembered that the cost of reservation is not shown by the respondent in his return of expenses.

Then we have the positive testimony of six witnesses who swear to the feasting at Basudebpur dak bungalow. One of them Bipin Belauri Ray an Excise Sub-Inspector was the senior polling officer at the Basudebpur polling station and occupied a part of the dak bungalow. He deposes as follows :—

“ The feeding took place in Banchhandhi Babu’s room as well as in the maidan and outhouses. Banchhandhi Babu was feeding the people. I saw some 20 or 30 men being fed in the morning and over 200 men in the evening The tables were brought in two carts on the 29th afternoon. These were kept inside the room occupied by Banchhandhi Babu.”

It is true that this witness did not report this affair to the presiding officer but he explains that he did not know that the feasting was illegal. The only suggestion made against him is that the present petitioner is an opium vendor in the town of Bhadrak. We fail to see why a sub-inspector of excise would perjure himself in this case, and we think we should accept his testimony and that of the other witnesses on this point, especially as they are corroborated by the probabilities and circumstances arising out of the reservation of the bungalow referred to above. In fact the evidence is practically one-sided.

The evidence on behalf of the respondent to disprove this allegation consists of the sole testimony of one Shayamanda Padhi who was a voter at Basudebpur and is a teacher at the Sanskrit pathsala in village Eram (which also is Banchhandhi Babu’s village). He proposed Upendra and Lakshmi Narayan Padhi who, together with the respondent, were congress candidates for the last district board election. Thus he is not independent. On the other hand, Uma Prashad Padhi, deposes that he saw some 400 or 500 persons being fed. Gopal Padhi, who is one of the persons named by the respondent in schedule D of his return as having received Rs. 4 as travelling expenses swears that 200 voters were fed. He names some of them. Another witness says he saw about 100 voters being fed. There can be no manner of doubt that feeding on an extensive scale was carried on here. As pointed out in Hammond’s “ Indian Candidate and Returning Officer ” at page 134, a candidate may properly feed those persons who are assisting him in the conduct of his election, but expenditure so incurred should be included in his declaration of expenses. In this case the return makes no mention of the feeding expenses. If an insufficient return be transmitted, it is evidence of knowledge on the part of the election agent that the omitted payments were corrupt (Parker’s Election Agent, 3rd edition, page 458). The expenditure for the refreshment at Jai Sahu’s shop and at Basudebpur dak bungalow was not a trifling amount and we cannot possibly suppose

it was omitted by accident. It is impossible to avoid the conclusion that these items were omitted purposely in order to conceal the fact of corrupt treating of the voters.

We find that the respondent's agent Banchhandhi Mahanti at Basudebpur and Radhashyam Naik at Bhadrak arranged for the refreshment of voters and gave feast and entertainment to them with the corrupt intention of influencing the voters.

It was urged on behalf of the petitioners that the return of election expenses was false in several particulars including the omission of the cost of supplying refreshment and food. In respect of the latter the report is as follows :—

“ It is urged on behalf of the respondent that as it represents an illegal item of expenditure, namely, treating, it is not required to be shown in the return which according to him is meant for legitimate expenses only. Rule 19, sub-rule (2) of the Bihar and Orissa electoral rules provides that the return shall contain a statement of all payments made by the candidates or by his election agent or by any person on behalf of the candidate or in his interest for expenses incurred on account of, or in respect of, the conduct and management of the election. Thus this rule does not qualify the term ‘ expenses ’ by the expression ‘ legal ’. Moreover, schedule IV, note *1, refers to *all* expenses. Also form XIX of return of election expenses shows that there must be entered in part K *all* expenditure incurred and payment made by the candidate or by his election agent or by any person on behalf of or in the interest of the candidate in connection with the election and not included in any of the previous parts. Also the form of declaration which has to be attached to the return and has to be signed by candidate or by his election agent (in accordance with schedule IV of the rules) shows that no expenses of any nature whatsoever which have been incurred for the purpose of the candidature are to be excluded from the return. The purpose of the return is evidently to check and control illegal expenditure. Therefore we consider that we should not read into the rules, the schedule, and the form, the word ‘ legal ’ before ‘ expenses ’.”

Reference was made by the learned vakil for the respondent to Parker's Election Agent at page 422 which runs as follows :—

“ An election expense is one ‘ incurred on account of or in respect of the conduct or management of an election ’. These words are used throughout the Act when dealing with legal expenses, larger words (‘ for the purpose of promoting or procuring the election of a candidate ’) being used in relation to illegal expenditure.” As rule 19(2) of the Bihar and Orissa electoral rules refers to the expenses incurred on account of or in respect of the conduct or management of an election, it is urged that only legal expenses are intended to be included in the return. However, Parker at page 456 mentions that “ all expenses paid on account of, or

in respect of, the conduct or management of the election, no matter by whom incurred, and whether for a legal or an illegal expense, must be returned". Whatever may be said on the general question it appears to us clear that expenses for feasting in connection with an election must be returned. Feeding is corrupt when done with the intention of influencing election. It may under certain circumstances, be harmless, for example, no man is bound to abstain from harmless hospitalities especially if they are customary because an election is pending. (Fraser, page 116.) No one would think it reasonable to draw the conclusion from the mere giving of a glass of sherbet to some old man coming from a long distance, that it was done with any intention of influencing the election. Also a candidate may lawfully feed the persons who are assisting him in the conduct of his election. Again the term "gratification", as defined in the explanation to clause 1 of schedule V of the Bihar and Orissa electoral rules, excludes the payment of expenses *bonâ fide* incurred for the purposes of election and duly entered in the return of election expenses. Therefore the question whether feeding was or was not confined to workers, and whether it was done on an extensive scale and with a view to influence the election is a necessary aspect for consideration, and therefore it seems necessary to include such expenses in the return. In the *Hartlepoons'* case (6 O'Malley and Hardcastle, page 1), Mr. Justice Philimore observes at pages 9 and 10 that the employment of any people for hire to walk about and parade the streets and show their colour so as to assist in the return of a candidate is an illegal employment, and although the expenses incurred on that account are illegal he held the expenses, if incurred by an agent, are expenses in the conduct and management of the election. He observes "It has been said there are cases where expenses may be incurred for promoting or procuring the election of a candidate, which are not expenses incurred in the conduct or management of the election. That may be so if they are incurred by persons who are outsiders and not agents, because those persons have not the conduct or management of the election, but if they are incurred by persons who take a share in the conduct or management of the election, it would be very difficult to say that they are not expenses in the conduct and management of the election, being, as they are, confessedly expenses incurred for the purpose of promoting or procuring the election of the candidate. At any rate in this case we have no doubt that these expenses are properly described as expenses in the conduct and management of the election." Similarly we hold that expenses for entertainment by an agent of the respondent (as in the present case) must be described as incurred in the conduct or management of the election. The omission, therefore, to include such expenditure makes the return false.

The sum of Rs. 80 consists of two different amounts of Rs. 55 and Rs. 25 shown in part A as *personal travelling* expenses of the candidate

paid during the period 10th to 29th November. No vouchers have been furnished on the ground (stated in paragraph 18 of the written statement) that "they are expenses of obtaining tickets from the proprietor of the taxi service or his agent incurred by the respondent or his *agent or canvassers* and no vouchers are obtainable in respect thereof". Thus the return is *prima facie* incorrect. The expenses for agent or canvassers, if included within this Rs. 80, should have been shown in different parts, separately. In the next place, it is in evidence no tickets are sold in the taxi service. It is unlikely that a particular owner's taxi will be engaged for ten successive days and the fare paid after each trip. It has been shown that at least one of the taxi owners, namely, Ali Aktar, was not paid in small sums but had his dues unpaid till at least the latter part of January, 1927. Therefore the voucher should have been given. The return was sworn to on the 6th and filed on the 8th January. At that time payment to Ali Aktar had not been made. Thus the return is false in material particulars.

For reasons given we hold that the return of election expenses submitted by the respondent is incorrect, false in material particulars within the meaning of sub-rule 4 of rule 22 of the Bihar and Orissa electoral rules.

The "treating" has according to us been done by the respondent's agents with the intention of influencing the result of the election and is a corrupt practice falling within part I of schedule V of the electoral rules and comes within the purview of clause 44(1) of the electoral rules.¹ There is no plea by the respondent and no proof, that the case falls within the exceptions referred to in sub-rule (2) of rule 44. As such the election becomes void apart from any question as to how far this treating has materially affected the result of the election. The election is, therefore, liable to be set aside.

The original petitioner cannot be declared elected as he has withdrawn from his petition. The petitioner is entitled to have the election set aside. The charge of filing an incorrect and false return, will not, by itself invalidate the election but will serve to disqualify the respondent subject to the exercise of the right of removal of the disqualification by the local Government under the proviso to rule 5, sub-rule 4 of the Bihar and Orissa electoral rules and may eventually lead to the seat being declared vacant.

For the foregoing reasons—

- (1) We find that corrupt practices of bribery by treating as defined in the explanation to rule 44 and specified in clause 1 of part I of schedule V have been committed by

¹ Now section 1 of the first schedule read with paragraph 7 of part III of the Corrupt Practices Order, 1936.

Banchhandhi Mahanti and Radhashyam Naik, agents of the respondent. A reasonable opportunity of showing cause why their names should not be mentioned in our report was given to them but the cause shown by them is unsatisfactory ;

- (2) We are not prepared to recommend the exemption of the persons named in paragraph (1) above from any disqualification they may have incurred :
- (3) We hold that the election of the respondent is void under rule 44 (1) (b) of the electoral rules ;
- (4) We report that no person has in our opinion been duly elected .
- (5) We further hold that the return of election expenses filed by the respondent is false in material particulars, and thus the respondent has rendered himself liable to the disqualification mentioned in rule 5, sub-clause (4) of the Bihar and Orissa electoral rules.¹

¹ Now paragraph 5 of part IV of the Corrupt Practices Order, 1936.

CASE No. XVI
Ballia District (N.-M.R.) 1920

GAURI SHANKAR PRASAD *Petitioner,*

versus

(i) THAKUR HANUMAN SINGH .. }
(ii) RAJA RAJENDRA PRATAP NARAIN DEVA OF } *Respondents.*
HALDI.

It is a question of fact, to be decided on the evidence produced, whether a statement in relation to the personal character or conduct of a candidate is believed by the publisher to be false or not believed to be true.

It is admitted by the parties present before the court that there were only three candidates for election, namely, the petitioner and the two respondents.

The Commissioners found that the petitioner was the only candidate who was duly nominated and therefore it followed that the petitioner should have been declared to have been duly elected without the holding of a poll.

They then discussed whether the facts alleged in the recrimination, if true, would invalidate the petitioner's election.

The recriminatory charged reads as follows: "Did petitioner or his agent, Rameshwar Sharma, publish the leaflet, exhibit L-1, as alleged by respondent 1 and does it constitute false statements within the meaning of schedule 4, part I, rule 4?"¹

In the recriminatory statements, paragraph 1, it is written: "Petitioner's agents, representatives and a large number of other persons apparently engaged by the petitioner were found carrying and distributing broadcast leaflets containing false accusations against the respondent's personal character."

Exhibit L-1 is one of the leaflets here referred to.

In the replication the petitioner has written as follows:—

"Paragraph 1 is admitted only so far that some persons fully acquainted with the doings and actions of respondent 1 prepared and signed a document headed 'Khula patra ka khula uttar no. 1' (open reply no. 1 to the open letter) by way of a reply to an open letter published by respondent 1 calling upon the voters to vote for him. The petitioner believing them to be true, got them printed and they were distributed as desired by the signatories. The respondent no. 1 admitted most of the allegations contained therein and offered explanations in another printed circular distributed by his men broadcast over his signature under the heading 'Akshepon ka khula hua uttar no. 2' (open reply no. 2 to the allegations), addressed to the said signatories. He also published a second open letter addressed to the voters. The said document herein first above-mentioned could not and did not amount to a corrupt practice on the part of the petitioner or his agents."

On April the 2nd last before this court it was stated on behalf of the petitioner as follows: "Rameshwar Sharma was petitioner's agent. He did not publish exhibit L-1, nor did the petitioner. The same remark applies to exhibits L-2, L-3 and L-4."

Up to this date therefore it appears that the petitioner denied having published the document, exhibit L-1, and he ascribes its publication to "some other persons fully acquainted with the doings and actions of respondent 1", who prepared and signed the document.

¹ Section 5 of part I of the first schedule Corrupt Practices Order, 1936.

On May the 3rd before this court the petitioner stated : " I admit publication of exhibits L-1, L-2, L-3, L-4 and L-6."

It is clear, therefore, that the petitioner has changed his attitude in regard to the document, exhibit L-1. At first he denied responsibility for it and now he admits that he published it himself and therefore is responsible for its contents.

The respondent 1 has relied on a number of entries in exhibit L-1 and evidence has been given in regard to such entries. The circumstances referred to in these various entries differ very much in importance. There are, however, two entries which state facts, which, if believed, would undoubtedly be calculated to have prejudiced the respondent 1's election. The first of these entries is entry no. 3, the translation of which is as follows :—

" In 1917 and 1918 when the terrible Ganges floods had occurred and all the crops were destroyed south of the railway line and most of the houses in villages had fallen down, and our mothers and sisters had to pass time by standing in water which was in some places waist deep and in others thigh deep, was it not you who spent Rs. 60,000 on suits for the recovery of rent ? It is heard that you yourself admitted that the tenantry had to spend 3 or 4 lakhs of rupees in defending those cases. What harm would it have caused you or your updeshtaks (preachers), who go about crying that small disputes should be settled by *Panchayat*, if you had settled those cases between the Raj and the tenantry by *Panchayat*, and thereby saved the poor tenantry from expenses and numerous troubles, but you never wanted such settlement. Do you ever do any good thing which you promise ? "

The respondent 1 is the manager of the Dumraon Raj which is situated to a considerable extent in the Ballia district. The charge made against him is that after the serious floods, which as a matter of fact occurred in 1916 and 1917, so far from his doing his best to help the tenants in their distress he utilized the opportunity to bring suits against them for arrears of rent and thus showed the cruelty and callousness of his character in relation to the tenant population.

The respondent 1 has produced evidence which shows that the accusations made against him are entirely false. So far from having oppressed the people he did his best to help them. Relief was organized. The villages were visited in boats. The estate spent Rs. 50 a day in providing medicine and food and other necessities and nothing like Rs. 60,000 was spent on rent litigation. The actual figures have been extracted from the estate account-books and they show that the expenses incurred by the estate in rent litigation were as follows :—

	Rs.
For 1324 fasli October the 1st, 1916, to September the 30th, 1917 ..	16,905
For 1325 fasli October the 1st, 1917, to September the 30th, 1918 ..	1,139
For 1326 fasli October the 1st, 1918, to September the 30th, 1919 ..	1,171

If the years 1324 and 1325 are taken together the total amounts to Rs. 28,300. If the years 1325 and 1326 are taken together the total amounts to Rs. 23,111.

These totals are very different to Rs. 60,000 and it may be noted that the figures given for the respondent 1 included an area greater than the area spoken of by the petitioner in exhibit L-1. It includes all the area mentioned by him together with some additional villages which were also affected by the floods.

In this connection it is interesting also to note that in 1324 fasli 1,309 cases of rent litigation were instituted, in 1325 fasli 939 and in 1326 fasli 867.

We find, therefore, that the accusations made in entry 3 of exhibit L-1 are false statements and they are undoubtedly statements which, if believed, would have prejudiced the respondent 1's election.

The other entry in exhibit L-1 to which we refer is entry no. 4. In the translation it is as follows :—

“ Have you ever paid attention to the young cows, heifers which are sold to butchers every year in the Dhanus Jug tñat is, Sudhist Baba's fair, which sale you can stop ? Is it not you who has introduced the sale of animals in the said fair ? ”

The respondent 1 has produced evidence which we have no hesitation in believing to show that the Sudhist Baba fair has been in existence for 30 or 40 years, that cattle were sold at the fair from the beginning, and that a certain number of butchers have always been known to attend the fair in disguise to purchase cows for slaughter. It is entirely untrue to say that it was the respondent 1 who introduced the sale of animals including cows at the fair, or that the conditions of sales of the animals at the fair are in any way different since he took charge of the Dumraon estate. The evidence shows that butchers attend in small numbers and in disguise. The sales of cattle have very considerably increased in recent years. It is obvious that it would be almost impossible to prevent sales to butchers if the butchers made their purchases in the guise of ordinary Hindu purchasers. It is clear that the respondent 1 is in no way responsible for the sale of cows to butchers at this fair, and it is unreasonable to expect such sales to be prevented.

We find, therefore, that the accusation is false. At the same time if it were believed, it would undoubtedly prejudice the respondent in the minds of the people of Ballia. The vast majority of the population of that district is admittedly Hindu and it is a matter of common knowledge that it is a district where the question of cow-killing has always aroused considerable excitement.

These two instances are the most important of the instances mentioned in exhibit L-1. Having found that these two instances are

false statements, it is unnecessary to consider other instances of less importance.

The only witness produced by the petitioner is the petitioner himself. It will be remembered that in the first instance the petitioner refused responsibility for exhibit L-1. He said that it had been prepared by other persons who were acquainted with the facts and he definitely denied publication either through himself or his agent. At a subsequent date, however, the petitioner admitted that exhibit L-1 was published by himself. He makes practically no attempt to show that the charges in exhibit L-1 are true, and, as already stated, we have no hesitation in finding that the two principal accusations have certainly no basis of truth in them.

The petitioner, however, maintains that it has not been shown that he either believed the statements in exhibit L-1 to be false or did not believe them to be true. According to him, he made enquiries which convinced him that the charges were true, and he therefore published exhibit L-1 in the *bona fide* belief that the allegations made therein were correct.

We are unable to exonerate the petitioner. We find that he published exhibit L-1 which contains false statements, and we find that there is nothing to show that he had any reasonable grounds for believing the statements to be true or for not believing them to be false. In his evidence he stated "I was told by many of the tenants of the Dumraon Raj, by schoolmasters and respectable gentlemen and from them I learnt that the allegations made in exhibit L-1 were true. These facts I heard before exhibit L-1 was written . . . I did not publish exhibit L-1 until I had made enquiries. I enquired from Virendra Vidyarthi, resident of Doaba, and also when I visited Bansdih for the second time I enquired from two of the signatories, Babu Gajadhar, Bisheshar Prasad, Narain Singh and Babu Gobind Prasad Singh. I also visited Bairia and made enquiries from Pande Shiva Shankar Prasad and others. Bairia is in the Doaba but not in the Dumraon Raj. The men I have mentioned are big zamindars. I have not summoned them. They were summoned by the opposite party but not produced".

Exhibit L-1, it appears according to the petitioner, was actually written by one Babu Brij Bihari Singh, B.A. of Chakia. He says this gentleman "was introduced to me after my first meeting at Raniganj early in June, 1920. He had also presided over an earlier meeting held on behalf of respondent 1 at or near the same place and he had also criticized, he told me, the respondent 1 as manager of the Dumraon estate. Afterwards this same Brij Bihari sent me a draft of exhibit L-1".

From this statement of the petitioner it is clear that he knew from the very beginning that exhibit L-1 was actually written by Babu Brij Bihari Singh and written by him alone. In his replication he has stated

that it was prepared and signed by a number of persons who were acquainted with the facts of the case. The petitioner attempts to explain the wording of the replication by saying that he meant that one person prepared exhibit L-1 and several persons signed it. We are not convinced by this explanation. The petitioner clearly gave a different version of how exhibit L-1 came into existence in his replication and now in these proceedings he had changed his position. In this connection it is very significant to note that it was not until May the 6th that this court was informed by the petitioner of the name of Babu Brij Bihari Singh. On that date he was represented as a most important witness for whom a commission should issue as the petitioner had only then discovered that he was absent in Burma. The same Brij Bihari Singh was obviously according to the petitioner's own showing a man of very unstable views. He is represented as having agreed to preside over a meeting held on behalf of respondent 1, but when he came to do so he made hostile criticisms against the very man in whose behalf the meeting was being held and subsequently he joined the side of the petitioner. A man of this nature would arouse suspicion as a matter of course, more specially when he refused to sign himself the document exhibit L-1. The petitioner says that he asked him to do so but Babu Brij Bihari Singh refused on the ground that he was afraid of the vengeance of the Raj officials. If he was afraid to sign, there is no explanation as to why he was bold enough to make hostile criticisms against respondent 1 at a meeting actually held in support of respondent's candidature.

Two of the signatories on exhibit L-1, Babu Gajadhar, Bisheshwar Prasad, Narain Singh and Babu Gobind Prasad Singh, were summoned as witnesses by the respondent 1. They were not produced in court but the petitioner made no attempt to have them placed before the court as his own witnesses. These were the two principal men whom the petitioner says he relied upon for the truth of exhibit L-1. He had an opportunity of producing these gentlemen before the court. He failed to avail himself of this opportunity with the result that there is nothing on the record to support his statements.

There are ten signatories of exhibit L-1. Of these, eight live in Bansdih which apparently is situated at a very considerable distance from the Doaba where the floods occurred and where the Sudhist Baba fair is held. The allegations in exhibit L-1 were made against respondent 1. The petitioner knew very well that respondent 1 was a gentleman of considerable standing who had occupied an honourable position for many years. Accusations against his personal character should necessarily have been very carefully examined before being accepted. The writer of exhibit L-1, Babu Brij Bihari Singh, refused to sign the document himself although, according to the petitioner, he had openly made a speech against respondent 1. Of the ten signatories to exhibit L-1,

eight belong to Bansdih and there appears to be no reasonable explanation why they should have had any special knowledge of the facts alleged in exhibit L-1. Of the remaining two signatories the last is Babu Kunj Bihari Singh of Chakia. This gentleman the petitioner had defended in proceedings brought against him for perjury. He was actually in Lucknow during the course of this case and he was sent by the petitioner to Ballia with the summonses for the petitioner's witnesses. The petitioner, however, has not thought fit to produce this witness before the court.

Many other criticisms could be made of the petitioner's attitude in regard to exhibit L-1. We find that he took no reasonable precautions to satisfy himself of the truth of the allegations made in that document. We find therefore that he had no reasonable grounds to believe that the statements made in exhibit L-1 were true or for not believing that they were false.

Under the circumstances, we decide issue 9 against the petitioner.

As a result of our findings on the various issues we report that the respondent 1 has not been duly elected. We also find that the petitioner is guilty of corrupt practices as defined by schedule IV, part I, paragraph 4, and is therefore debarred from being declared elected himself. We order that parties shall pay their own costs.

Under rule 45 of the electoral rules we find that it has been proved that the petitioner has committed a corrupt practice as defined by schedule IV, part I, paragraph 4, and we do not recommend that he be exempted from any disqualifications he may have incurred on this account under the rules.

Proceedings against respondent 2 were *ex-parte*. As far as he is concerned, we report that he was not duly nominated.

CASE No. XVII

Ballia District (N.-M.R.) 1931.

(UNITED PROVINCES LEGISLATIVE COUNCIL.)

DAHARI DHOBI *Petitioner,*

versus

RAI BAHADUR SARJU PRASAD SINGH .. *Respondent.*

Signature to a nomination paper includes a thumb-impression or the making of a mark.

THE returning officer rejected the petitioner's nomination because he had put only his thumb-impression to the declarations required by the rules instead of signing his name to them.

The Commissioners reported :—

The main question for decision is whether a person who puts his thumb-impression to a declaration can be said to subscribe it. "Subscribe" means primarily "to write under something" but it is clear to us that the word, is in the present connexion synonymous with the word "sign". This word is defined in the General Clauses Act (X of 1897) and in the United Provinces General Clauses Act (I of 1904) as follows :—

"'Sign' with its grammatical variations and cognate expressions shall with reference to a person who is unable to write his name include 'mark' with its grammatical variations and cognate expressions."

Even if neither of the two Acts applies, on strict interpretation, to the rules with which we are dealing, we still have no doubt that the definition expresses the meaning of the word as generally understood in common parlance and in legal phraseology. We have, therefore, to decide whether there is anything in the rules themselves which might lead us to suppose that the words "subscribe" or "sign" are used in them in any particular or restricted sense. Our attention has been drawn to regulation no. 21 of the regulations for the election of members to the Legislative Council of the United Provinces and also to the form of signature slip to which that regulation refers. The relevant words are :—

"The name of every person presenting himself to vote and his number on the electoral roll shall be entered on a slip in form 4 attached to these regulations and such person shall thereafter, if he is literate, sign his name in the column provided for that purpose or, if he is illiterate, fix his thumb-impression thereto."

In the form of the signature slip there is a column which is headed "Signature of voter, if literate, or thumb-impression of voter, if illiterate". The suggestion is that the framers of the regulation intended to draw a distinction between a signature and a thumb-impression and that by signature they meant the signing of a name as distinct from the making of a mark. It is contended that it would have been sufficient to use the word "signature" alone if that word included the making of a mark. The argument does not appeal to us. Under the definitions in the General Clauses Act the word "sign" with reference to a person who can write his name means to write a name. It is only with reference to a person who is unable to write his name that the word includes the making of a mark. It is obvious that the intention of the framers of the regulation was that a person who would be entitled to make a mark should make a mark only of one kind, namely, a thumb-impression, because probably

such a mark is easily identifiable and would effectively prevent personation. If they had omitted any reference to a thumb-impression, a person who was unable to write his name would have been entitled to make a mark which would not have been easily identifiable. It does not appear therefore, that there was any intention to use the word "signature" in a sense which would exclude the making of a mark. Reference may be made to regulation no. 8(6) of the regulations for the election to the Legislative Council of the United Provinces of Agra and Oudh of members for the Agra landholders' constituency which says "If an elector is unable to read or write ... the attesting officer shall assist him in such manner as may be necessary to ... sign the declaration on the back thereof". The declaration is given in form 4 and is as follows :—

"I hereby declare that I am the person whose name appears.....
no..... on the electoral roll of landholders for the election to the
Legislative Council of the United Provinces of Agra and Oudh as
member for the Agra landholders' constituency of the.....
and.....divisions."

It is quite clear that the word "sign" in this regulation is intended to include the making of a mark. We have no hesitation in holding that the word "subscribe" in rule 11 of the electoral rules is used in its ordinary sense to include the making of a mark. Furthermore, if we were to hold otherwise, the necessary consequence would be that all illiterate persons would be disqualified as candidates for election as members of the Council. The disqualifications for being elected are given in rule 5 of the electoral rules and do not include illiteracy. Rules for disqualification should be strictly interpreted, and we are of opinion that a specific rule upon this subject would have been made if there had been any intention to disqualify persons who were illiterate. It has been urged that illiterate persons are disqualified for election as members of district and municipal boards and that *a fortiori* they should be disqualified for election as members of the local Legislative Council. This is a question of policy with which we are not concerned and we cannot fail to point out that the disqualification is specifically mentioned in the United Provinces Municipalities (Amendment) Act, 1922, and the United Provinces District Boards Act, 1922. This fact strengthens our conviction that the electoral rules would have specifically mentioned illiteracy as a disqualification if it had been intended that illiterate persons should be excluded from the Legislative Council. Finally, we may say that the interpretation which the returning officer has placed on the word "subscribe" would exclude not only persons who were illiterate but also persons who owing to temporary physical disability as the result of accident were unable at the time to sign their names to the declarations required by rule 11(3) and rule 11(5). This, in our opinion, would be a startling result. We hold that the petitioner by appending his thumb-

impression to the necessary declarations complied sufficiently with the provisions of rule 11 of the electoral rules and that his nomination was improperly refused. We hold further that it may be presumed, as there were only two candidates nominated, that the improper refusal of the petitioner's nomination materially affected the result of the election. The result is that the election of the respondent, the returned candidate, is void. Our report, therefore, is that the respondent has not been duly elected and nobody else claims the seat.

It does not appear that the petitioner's nomination was refused on the objection of the respondent, and in the circumstances we recommend that the parties shall pay their own costs.

CASE No. XVIII .
Bareilly City (N.-M.U.) 1924 °
(UNITED PROVINCES LEGISLATIVE COUNCIL.)

BABU CHHAIL BIHARI KAPUR . . . *Petitioner,*

versus

THAKUR MOTI SINGH . . . *Respondent.*

The withdrawal of a criminal charge was held to be the receipt of a reward for voting and procuring votes and therefore an act of bribery.

A canvasser whose abolished post was revived was held to have received a reward and therefore to have committed a corrupt practice. The candidate who procured the rescission of the abolition of the post was held to be guilty of undue influence.

The wholesale employment of municipal staff and school teachers was such as to prove that the election was not a free election. Para 7 (1) (d) of part III of Corrupt Practices Order, 1936.

THE petition contained charges of bribery, undue influence, publication of false statements, etc.

The allegation of the petitioner is that "with the object of inducing one Lala Ram Mohan Lal (voter no. 4113) and his son Lala Birj Bhukan Lal (voter no. 3976) to vote for the respondent, the latter, on (or about) the 30th November, 1923, offered a gratification to the said Ram Mohan Lal in that he told him that by using his influence with his friend Babu Jia Ram Saxena, municipal chairman, he would procure the withdrawal of the prosecution under sections 420/467, Indian Penal Code, which prosecution had been instituted against the said Ram Mohan Lal and his said son by the said municipal chairman and which was then pending in the court of the Joint Magistrate, Bareilly. In pursuance of this understanding, Lala Ram Mohan Lal actively canvassed for the respondent and on the polling day acted as his polling agent". Further that "on the 11th December, 1923, the said Babu Jia Ram Saxena (one of the most zealous agents of the respondent) at the respondent's instance, compromised the case and actually withdrew the above prosecution a day before the date fixed for hearing. This was done by way of a reward to the said Ram Mohan for his vote and for his active work in furtherance of the respondent's candidature".

This is in effect an allegation that Ram Mohan Lal was bribed by the respondent to vote and procure votes for him with the connivance of his friend and partisan Babu Jia Ram Saxena, chairman of the municipal board, the bribe being an understanding that the criminal case pending against him would be compromised, as in fact it was, just after the election.

Ram Mohan Lal is a well-to-do *Panseri* and the evidence has brought out that he has large numbers of relations who are voters. On these voters he was presumably in a position to exercise some influence.

A case was instituted under sections 417/468, Indian Penal Code, and the 30th November fixed for the first hearing. This date was subsequently altered at the request of Babu Jia Ram to 12th December and on 4th December a request to summon witnesses was presented by the board. The election for the Council took place on the 7th December.

On the 12th December an application (exhibit 3) was made by Ram Mohan countersigned by Babu Jia Ram to the Joint Magistrate for withdrawal of the case and was allowed the Magistrate holding, too summarily, to our thinking, that there was no case under section 468.

In the meantime, some days prior to his interview with Babu Jia Ram, Ram Mohan had started working for Thakur Moti Singh, at the instance, it is said, of Dr. Shiam Behari Gupta, also a municipal commissioner and a mutual friend of the parties. On 4th December Ram Mohan was actually appointed a polling agent and accompanied the respondent

in his canvassing. On the day of the poll he identified for him a large number of voters—among them presumably his numerous relations.

It is in evidence also that it was only on the eve of the poll that all the voters of Ram Mohan's mohalla decided to vote for Thakur Moti Singh. In this Ram Mohan's influence, though not directly proved, may fairly be inferred.

Such are the facts as disclosed in the evidence before us.

The question that we have to decide is whether any connection between the withdrawal of the criminal case against Ram Mohan and the act of the latter in voting, canvassing and working for the respondent is proved and if so whether such connection comes within the definition of bribery in schedule V, part I, section 1.¹

Direct evidence of any such connection would naturally not be forthcoming, and the failure of petitioner to show that the respondent offered a gratification to Ram Mohan, by promising to use his influence to procure the withdrawal of the criminal case need occasion no surprise.

But apart from this the close intimacy between Thakur Moti Singh and Babu Jia Ram—to which the former speaks and which the active part taken by Babu Jia Ram in supporting Moti Singh confirms—renders it very unlikely that Moti Singh was unaware of or did not connive at—even if he did not actually procure—the favour which Babu Jia Ram was showing to a man in whom as his canvasser and polling agent Moti Singh must have had a special interest. The municipal file shows that the case had attracted the attention of other municipal commissioners and Moti Singh must, we think, have known all about it.

In any case it is clear that Babu Jia Ram was an agent for Thakur Moti Singh in connection with the election. If then the withdrawal of the criminal case pending against Ram Mohan was in the nature of bribery as defined in schedule V an offence under part I of that schedule would be established.

Ram Mohan denies that he asked Moti Singh, to get his case settled or that Moti Singh told him that if he voted for him he would get his case settled. He did not strike us as in any way partial to the petitioner and we consider his evidence may be relied upon. He admits that he worked for Moti Singh in the hope that if Moti Singh got into the Council Babu Jia Ram would be so pleased that he would forgive him and withdraw the case, and this is, we think, the explanation of what took place. The event showed that Ram Mohan, if we may use the phrase, sized up the situation accurately.

We are not clear that the favour shown by Babu Jia Ram to Ram Mohan—a favour which, in the circumstances, we consider to have been most injudicious to use no stronger term—can bring his act within the

¹ Now section 1 of part I of first schedule of Corrupt Practices Order, 1936.

definition of bribery in schedule V in the absence of corrupt intention. We are ready to believe, having regard to Babu Jia Ram's character and position that he did not deliberately withdraw the criminal case as a reward to Ram Mohan for having voted or procured votes for Moti Singh, but when we note the singular coincidence between his sudden change of attitude in regard to the criminal prosecution of Ram Mohan and the employment of the latter by the respondent we feel that he allowed himself to be influenced, unconsciously it may be, by his knowledge of the services rendered by Ram Mohan to this friend Moti Singh. It is possible that he genuinely thought that the case had weak points and was therefore not worth fighting if he could get a substantial contribution to the municipal funds. In giving Babu Jia Ram, however, the benefit of the doubt we feel constrained to say that in our opinion he did not act with the firmness that his office demanded, and if his acts have been misinterpreted he has only himself to thank. We are, however, satisfied that in Ram Mohan's case the withdrawal of the criminal charge must be held to be the receipt of a reward for voting and procuring votes for Thakur Moti Singh and therefore an act of bribery as defined in part II (section 3) of schedule V.

We look on this case of Ram Mohan as an instance of the insidious influences which have been exerted in various ways by the dominant party in the municipal board to secure Thakur Moti Singh's election, the effect of which has been to deprive the election of its essential freedom.

The petitioner's case was set out as follows in the particulars of corrupt practices: "That with the object of including Mr. Mahtab Rai, municipal engineer (voter no. 3822), to vote for him and to generally procure for him the votes of other voters amenable to his influence, the respondent, about the middle of November, 1923, promised to use his influence as a municipal member for securing rescission of the municipal board's resolution whereby several months before the said board had resolved to abolish his post. Accordingly the said Mr. Mahtab Rai very zealously canvassed for the respondent, both on the polling day and on the day preceding thereto."

The evidence has not satisfied us that the respondent made any promise to Mahtab Rai to use his influence in the direction stated, and though the attendant circumstances give rise to suspicion, we consider that we should not be justified in holding that bribery as defined in part I of schedule V has been established. We therefore find the charge not proven as against the respondent. But we consider that there was a receipt by Mahtab Rai of a reward for his services in canvassing for Thakur Moti Singh which brings him within the meaning of section 3 of part II of schedule V.

We cannot resist the conclusion that this was a case in which influence was indirectly and unduly exercised on Mahtab Rai and through him

on the voters by the respondent, who made an unfair use of his position as municipal commissioner and member of the strong party of swarajists on the board.

On the 5th June the municipal board unanimously accepted a proposal made by a retrenchment committee that the services of Mahtab Rai be dispensed with and three months' notice was given to him.

On the 15th November the municipal board had before it the revised budget, but for reasons which are not apparent from the minutes decided to postpone its consideration till 10th December. At the adjourned meeting, which took place on 17th December instead of the 10th the board executed a complete *volte face* and cancelled all the retrenchments unanimously passed in June. It is not surprising to find the chairman saying on the 17th January that this "cancellation of retrenchment proposals is unfortunately liable to various interpretations". At any rate the effect of the resolution of 17th December was to reinstate Mahtab Rai. He had, if we may use a colloquialism, backed the right horse.

It is not, in our opinion, possible to hold that Mahtab Rai had supported Moti Singh from motives unconnected with the hope of favours to come. Nor can we, when we consider the strange coincidence of time between the canvassing of Mahtab Rai and his reinstatement, avoid the conclusion that the conduct of the municipal board, guided by their chairman and his swarajist colleagues, of whom the respondent was one, was calculated to encourage these hopes.

Mahtab Rai's influence in Bareilly was not confined to what was derived from his private social status. His position as municipal engineer, whose duty it was to receive and report on all building applications was one of considerable power. In our view the influence that executive officials such as a municipal engineer are in a position to exercise on voters cannot by any stretch of imagination be called legitimate, and we suggest that they should be forbidden to canvass or work for a candidate at any election—whether to the municipal board or to the Legislative Council. The mere fact of their doing this is bound to exercise an influence on the voters which, in the present conditions of Indian life, is reasonably calculated to interfere with the free exercise of their electoral rights.

There is in Bareilly a class of workers in wood and iron who are known as Maithals. Ram Lochan Shastri was president of the local Sanatan Dharm Sabha. It was proved that he had canvassed among all his caste-fellows and had held out hopes to the Maithals that he would raise them to the status of Brahmins. It appears that the Maithal community looked upon the election as an opportunity for their advancement in the social scale.

Evidence was given that on three occasions Ram Lochan Shastri threatened that if the Maithals did not vote for Thakur Moti Singh he would publicly proclaim that they were Sudras. In one of these cases

a witness deposed that in consequence of this threat his father abstained from voting. It was proved that Ram Lochan, who was an employee in a municipal school, took an active part in canvassing for the respondent, who did not repudiate his services, and therefore Ram Lochan Shastri must be regarded as the respondent's agent. The Commissioners found that this amounted to undue influence as defined in schedule V, part I, rule 2.

Dealing with the two allegations of personation, the Commissioners found that Kandhe Mal Sunar, voter no. 4924, admittedly voted twice. His name appeared at two places in the electoral roll. His plea was that he was told by one Seva Ram who was not produced, that he was entitled to a second vote.

Satis Chandra (P.W. 13) who identified Kandhe Mal at the polling station, was identifying voters for the respondent and was a clerk in the school in which the respondent was manager.

The Commissioners reported :—

The facts proved constitute, strictly speaking, undue influence as defined in schedule V, part I, rule 3 ; but we consider that owing to the error in the roll the breach of the rule is a technical one and in the peculiar circumstances we are not prepared to take cognizance of it.

The second case of personation related to a vote given by Shamlal, son of Ghamandi Lal, head clerk in the Grass Farm office. He was persuaded by one Badri, a pan-seller, to go to the Town Hall as Badri insisted that he had a vote. He was given a slip with a written number, and then Badri passed him on to another man who took him to a clerk who asked if his father's name was Bijai Singh. Shamlal replied that his father was Ghamandi Lal. The man who had brought him up said that the electoral roll was at fault. Shamlal was then given a signature slip which he signed, and the man to whom Badri had made him overtook him over to the polling room where he voted for Moti Singh, respondent. Shamlal could not identify the man who took him into the polling room, but it was clear that his application for a voting paper was abetted by the partisans of Moti Singh, who were at the respondent's " bistar " outside the polling place. His signature slip was not attested by an identifier as required by the rules, and his name did not appear in the electoral roll.

The Commissioners reported :—

We find it proved that Shamlal did vote as voter no. 3464, and that his application for a voting paper was procured through the agency of Badri, who is shown to have canvassed for the respondent and must therefore be regarded as his agent.

We find that the respondent has committed the corrupt practice of personation under schedule V, part I, rule 3 in respect of Shamlal through his agent Badri (panwala) and other agents unknown. We are not

satisfied that the witness Shamlal was guilty of corrupt practice and therefore do not propose to take further action against him.

The gist of paragraph 12 of the petition (A in the list of particulars) on which this issue is based is that the canvassing of certain municipal officials for the respondent and the employment of others as his helpers on the polling day produced an impression on the minds of municipal employees in general that it would be to their advantage to vote for the respondent, i.e. the exercise of their franchise was not free.

In the evidence and in the arguments the case has been carried somewhat further. The allegation of the petitioner, which the respondent has been at pains to controvert, and which indeed is hinted at in the petition, is that the utilization of municipal servants to canvass and work on the polling day for the respondent and the active participation of the chairman in the election have directly or indirectly influenced the voters and prevented a free election.

This raises an important point of principle, which so far as we are aware, has not previously been dealt with by judicial decision.

The evidence discloses the following facts :—

Babu Jia Ram, the chairman of the municipal board, was an enthusiastic supporter of the respondent. He canvassed for him, spoke at election meetings for him, and on the election day was present at the Town Hall polling station more or less continuously from 10 o'clock till 4 o'clock taking an active interest in the voting and sending messengers to fetch voters.

Babu Mahtab Rai, the municipal engineer, as set out above canvassed for the respondent and also worked for him on the polling day.

Municipal school teachers were employed to work for the respondent at the polling stations and were apparently utilized for fetching voters to record their votes (evidence of Babu Jia Ram).

At the Town Hall Dhananja Parshad, the headmaster of the Teachers' training school, says that he saw 20-25 teachers working for Moti Singh. Lala Bhurimal saw the same number of municipal employees at the Qila polling station "doing odd jobs for the respondent". Babu Kalicharan, a municipal commissioner and witness for Moti Singh, was "not prepared to repudiate the suggestion that municipal employees were working for Moti Singh at the polling station". Pandit Ram Lochan Shastri, a teacher in the E.I.M. school of which the respondent is the manager, used his religious influence, with a view to persuading voters of a certain caste to vote for the respondent.

To take first, the case of the municipal employees themselves.

Thakur Moti Singh has admitted that "the congress party has generally the predominating influence in the Bareilly municipal board".

The chairman and the two vice-chairmen are president and members respectively of the local branch of the Swaraj party of which the respondent was the nominee. The respondent himself is chairman of the municipal advisory committee. Clearly then it was to the interest of municipal officials to help Moti Singh. It was quite possible that those who worked for the respondent may have done so willingly on that account, but they could not have worked without Moti Singh's invitation or connivance. Thakur Moti Singh is manager of the E.I.M. municipal school and the chairman of the municipal education committee is also a swarajist. The wholesale employment of municipal school teachers in Moti Singh's election work on 7th December is therefore not without significance.

Incidentally their employment must have reduced Moti Singh's election expenses (which were borne by the Swaraj party) for no remuneration on their account is shown in his return of expenses.

Moreover, special circumstances existed which must have had a powerful influence on the minds of municipal school teachers. The resolution of the municipal board of the 5th June, 1923, had reduced by half the increments allowed to the staff of the W.I.M. and E.I.M. schools whose pay exceeded Rs. 40. This resolution was followed by numerous representations which were considered by a revision committee and rejected by the board on 1st October. The agitation, however, continued and the matter would presumably have come up when the revised budget was up before the board on 15th November, 1923. But the consideration of that budget was postponed from 15th November to 10th December—significant dates—and then on 17th December the resolution of 5th June was reversed. It is difficult to believe that these tactics had no influence on the municipal employees affected, and it is, we think, a legitimate inference that they were not in a position to exercise their franchise with freedom and independence when the question of the restoration of their allowances was being held over them. The interference with the free exercise of their electoral rights may not have been direct, but it assuredly was such indirect interference as is contemplated by section 2, part I of schedule V. •

We must therefore hold that the petitioner has proved his charge under this issue.

The same view must be taken in regard to the general voter. "The law cannot strike at the existence of influence it is the abuse of influence with which alone law can deal." (Willes J., quoted in Hammond's Indian Candidate and Returning Officer, 1923 edition, page 143.)

The Indian voter is peculiarly susceptible to influence and it is doubtless for this reason that the Indian law as to undue influence is wider than the English law. Until the Indian electorate is more educated

this distinction must be maintained and enforced. The chairman of a municipal board must inevitably be a man of influence. He is invested with extensive executive powers affecting a large population. In fact the influence of a municipal chairman in an election for the representation of an urban area must be, if not greater than, at least as that of the Collector, who is forbidden to take any part in elections. We consider that he should be excluded from canvassing and playing the part of an agent at the poll for any candidate. Such participation constitutes in our opinion an abuse of influence. Should he be standing as a candidate himself he should be precluded from using as agents or canvassers the officials under his control. We think therefore that Babu Jia Ram's conduct in this election was open to criticism as interfering indirectly with the free exercise of electoral rights. We note that in correspondence with the petitioner's son—himself a municipal commissioner—on this subject, Babu Jia Ram admitted that he felt "it was not safe for any municipal servant to side with any candidate, whoever he might be" (exhibit E). We think it is unfortunate that he did not act up to these principles himself.

As we have said in discussing the case of Babu Mahtab Rai, our view is that neutrality should be imposed on all executive officials of a municipal board, in an election for the representation of the area over which their powers extend. This principle has been recognized in the case of Government servants. We consider that it should be extended to municipal and district board servants. We are unable to hold that the election of the 7th December in Bareilly for the Local Legislative Council was a free one. We find that rule 44 (1) (d)¹ is applicable and that the election must be declared void under that rule.

We have found that the petitioner has established charges of personation and of undue influence against the respondent and we hold that the election has not been a free election by reason of the large number of cases in which undue influence and bribery within the meaning either of part I or part II of schedule V has been exercised or committed [rule 44 (1) (d)].

We therefore recommend to His Excellency the Governor that the election of Thakur Moti Singh be declared void and that he be directed to pay the costs of the petitioner which we assess at Rs. 593.

Under the proviso to rule 47 we called on Babu Jia Ram Saxena, Babu Mahtab Rai, Lala Ram Mohan Lal, Pandit Ram Lochan Shastri and Badri to show cause why they should not be named in our report as having committed corrupt practices and they have appeared before us. Their explanations have not led us to change the views we have expressed in regard to their conduct. In view, however, of the fact that electoral

¹ Now paragraph 7 (1) (d) of part III of Corrupt Practices Order, 1936.

practice is in its infancy in this country and that no definite rule exists prohibiting the chairman or executive officials of a municipal board from actively supporting a particular candidate at an election, we consider that no stigma attaches to Babu Jia Ram Saxena, and recommend that he be exempted from any disqualification he may have incurred under the electoral rules. We recommend a similar indulgence in the case of Babu Mahtab Rai and Pandit Ram Lochan Shastri.

Recriminatory petition.

The petitioner having claimed the seat for himself, the respondent has filed a recriminatory petition under rule 42 to show that if the petitioner had been returned candidate his election would have been void, inasmuch as he was guilty personally and by his agents of various corrupt practices which are specified in a list attached to the recriminatory petition.

The Commissioners disbelieved the evidence regarding bribery and held that personation was not proved. On the remaining charge they reported :—

It is alleged by the respondent that on the 5th December, 1923, at a public meeting at Shahamatganj Babu Brij Bihari Mukhtar, the agent of the petitioner, stated that Thakur Moti Singh, being the secretary of the Hindu Sabha, was responsible for the opening of meat shops in Hindu mohallas.

Babu Ram Sarup, health-officer of the Bareilly municipality deposes that from his order refusing to grant him a licence for a meat shop one Abdul Aziz appealed to the board and that his appeal was allowed by the board in the middle of July or August. Since that time 18 new licences for meat shops have been issued, some of which are in Hindu mohallas. The petitioner argues that Moti Singh was absent from the board's meeting which decided the appeal of Abdul Aziz and that Brij Bihari's statement at the meeting at Shahamatganj was a mere criticism of Moti Singh's public conduct and not a statement of fact. There is no satisfactory evidence to establish whether the words by Brij Bihari at Shahamatganj were "meat shops were opened" or "Moti Singh got them opened" ("khul gayin" or "khulwa din"). There is only the respondent's own statement against that of Brij Bihari, for the respondent's witness Ram Sahai has been shown to have no reliable recollection of what was said at the meeting and his evidence must be disregarded.

We hold it not proved that the petitioner's agent published the false statement that Thakur Moti Singh got meat shops opened in Hindu mohallas. Moreover, had the words suggested been used, we think that the criticism that the respondent as a member of the municipal board, was responsible for the opening of the meat shops in Hindu quarters

would not fall within the meaning of section 4, part I of schedule V. In this connection we had the advantage of seeing the report of the election Commissioners in the *West Coast and Nilgiris* (see page 712), and we agree with the view expressed by them.

The result is that the recriminatory petition fails. This being so, and Babu Chhail Bihari having established that the election was not a free one, it becomes a question whether the petitioner who claimed the seat himself should be declared duly elected. It is urged on us that this follows as a matter of course. We are not prepared to accept this contention. In fact its acceptance might lead to an obvious absurdity in such cases where the petitioner is defeated by an overwhelming majority of votes and cannot therefore be said to represent his constituency. In this connection our attention has been drawn to the report of the election Commissioners in the *Dinajjpur* case, 1924 (see page 341).

We agree with the Commissioners in their view that rule 34 might be amended so as to afford some guidance to petitioners as to the circumstances in which such a claim is proper. A petitioner who claims the seat himself should, we consider, be prepared to show that but for the acts of the respondent he would have received a majority of the votes recorded.¹

In the present case the number of votes cast for Babu Chhail Bihari Lal was only 900 as against 1,450 cast for Thakur Moti Singh. It has not been shown to us how many votes were lost to the petitioner through the election not being a free one, and we are not prepared to hold that but for the existence of undue influence Babu Chhail Bihari would have been returned.

We are therefore of opinion that Babu Chhail Bihari Capoor is not entitled to be declared duly elected and that there should be a fresh election. And this is our recommendation. We further recommend that Thakur Moti Singh be directed to pay Babu Chhail Bihari Kapur Rs. 100 as costs in respect of the recriminatory petition.

¹ This is now the law, *vide* paragraph 3(2) of part III of the Corrupt Practices Order, 1936.

CASE No. XIX

Bareilly City (N.-M.U.) 1925

NANHE MAL *Petitioner,*

versus

CHAUDHURI JAI NARAIN *Respondent.*

A recount will only be granted in cases which are substantiated by specific instances and by reliable *prima facie* evidence. *Tanjore* case quoted.

Evidence necessary to prove agency discussed. To establish the offence of personation a corrupt motive must be proved.

ALTHOUGH the petition contained many grounds for assailing the election of the respondent, issues were only framed on three charges. The first related to the manner in which the returning officer counted the votes, one alleged the exercise of undue influence, and two separate instances of personation were discussed. The election was held to be valid.

The returning officer was the Collector of the district and the counting of votes was done partly in his court-room and partly in an adjoining retiring room. We made an inspection of these rooms and found that they were situated one behind the other with a door of communication in between. This door was admittedly open all the time that the counting was in progress. Twelve separate tables were laid out, six on the floor of the court-room and one on the dais, while the remaining five were in the adjacent room. The returning officer occupied a chair on the dais quite close to the communication door, so that he could have a clear view of what was happening in both rooms, while at every one of the twelve tables on which the votes were being counted sat a subordinate officer of the district—in all cases but two a Deputy Magistrate—who was assisted in the process of enumeration by two clerks. It is further admitted that one agent of each candidate was present all the time and kept moving about from table to table. The argument on behalf of the petitioner is that under the circumstances mentioned above the counting of votes was not done under the supervision of the returning officer as contemplated in sub-rule (6) of rule 14 of the electoral rules. It was contended that in order to satisfy the requirements of the rule just mentioned it was necessary for the returning officer to have every ballot-box opened and the papers contained in it sorted and counted in his immediate presence. As stated above this argument was advanced but half-heartedly, and we have no hesitation in saying that, in our opinion, it carries little weight. If this contention is accepted, the returning officer would be precluded almost entirely from taking any assistance. All that the said rule demands, in our opinion, is that the supervision of the returning officer should be sufficient to eliminate, as far as possible, all chances of a mistaken or false declaration of the result. This demand, we think, was fully satisfied by the conditions mentioned above, under which ballot-papers were counted in the present case. The total number of votes polled being only about 2,200, it is clear that, on an average, no more than 200 ballot-papers were sorted and counted at each table in the immediate presence of a responsible officer and the whole process was supervised by the returning officer himself. The chances of mistake or fraud were, therefore, very few indeed. In this connection certain admissions made by Ram Sarup, who was present at the counting on behalf of the defeated candidate, are not without significance. This witness admits that no doubt as to the correctness of

the counting arose in his mind until the result was declared, and that any doubt arose at all was due to the fact that at the end of the polling the agents of the defeated candidate believed that the chances of election were in their favour. Our attention was particularly drawn to the fact that, contrary to the provisions of the rule to which we have referred above, the returning officer permitted only one agent of each candidate to be present at the time of counting. That this was a non-compliance with the rule admits of no doubt, but we have not the slightest reason for holding that the result was materially affected thereby.

“The only other question that has to be decided in connection with this issue is whether the petitioner is entitled to a recount, and we have no doubt that the answer must be in the negative. We fully agree with the view taken by the election Commissioners in the *Tanjore* case (see page 675), that ‘a recount will only be granted in cases which are substantiated by specific instances and by reliable, *prima facie* evidence’. It cannot even be pretended in the present case that these conditions are present.”

The charge of undue influence was that an Honorary Magistrate named Akhtar Husain Khan—a friend and worker of the respondent—who owns some shops in the city, exercised undue influence on Sunder Lal, a tenant of one of these shops, by threatening him with ejectment if he recorded his vote in favour of the defeated candidate. The petition contained no definite allegation that this Akhtar Husain Khan was an agent of the respondent, nor that he committed the alleged corrupt practice with the connivance of the respondent or some one of his agents. But an allegation to that effect was made when the pleadings were cleared and an issue was framed accordingly.

“Even at this stage there was not the faintest suggestion that the respondent actually accompanied Akhtar Husain Khan when the latter approached Sunder Lal. A statement to that effect appeared for the first time in the evidence of Bira Mal and Ganesh Prashad, the only two witnesses produced by the petitioner to support his case. We have no doubt that the part ascribed to the respondent is entirely an after thought. It was introduced in evidence simply because it was realized that even if the alleged corrupt practice by Akhtar Husain Khan was established, there would still be nothing to show any connection between him and the respondent. The evidence of the two witnesses named above is, therefore, clearly tainted with falsehood. This would be a sufficient ground for rejecting their testimony, even if we had nothing else to say against them. But besides being witnesses of no status who can be easily procured, they are fellow castemen of the petitioner, and seeing that there are clear indications of a touch of communal feeling in the present case, their statements are hardly worthy of serious notice.”

The Commissioners further stated—

“ We do not consider it necessary to enter into any further details to show that the petitioner's allegation is utterly false. We are content with remarking that we fully believe the testimony of Akhtar Husain Khan who has very emphatically and convincingly given the lie to the petitioner's allegation. This issue is accordingly decided in the negative.

Two charges of personation were framed and discussed.

(i) At the polling station set up in the Government High School a person named Radha Kishan, son of Jugal Kishore, Khandelwal by caste, resident in Alamgiriganj, personated voter Radhe Lal, son of Chote Lal, Agarwal by caste, resident of Nayatola.

It will be noticed that the name of the father, the residence and the caste in the two cases were different. Although in support of Radha Kishan, the alleged personator, it was asserted that he was also called Radhe Lal and had a real uncle named Chhote Lal, so that there were reasonable grounds for believing that the disputed entry referred to him, though there was a mistake, by no means uncommon, in the column showing parentage, the Commissioners pointed out that “ where a charge of personation is laid, the onus of establishing every essential ingredient lies as heavily on the petitioner as it does on the prosecutor in any criminal case. Now it is a well-settled proposition of law that there can be no corrupt practice without a corrupt motive. It is therefore obviously the duty of the petitioner in the present case to establish that Radha Kishan, when he recorded his vote or that the respondent's agent when he procured Radha Kishan's vote, had a corrupt motive, or, in other words, that he could not have acted in the *bona fide* belief that Radha Kishan had a right to vote. Having carefully considered the whole of the petitioner's evidence bearing on the point under consideration we have unhesitatingly arrived at the conclusion that it falls far short of the standard laid down above.

“ We shall now refer to an important fact which has not been mentioned so far but which, in our opinion, goes to the root of the whole matter and strongly militates against the theory of personation. This fact was disclosed by Ram Kishore—the first witness for the petitioner—who was the polling agent of the respondent and accompanied Radha Kishan when the latter applied for a ballot-paper. He stated that the discrepancy as to Radha Kishan's parentage was brought to the notice of the polling officer before the latter issued the ballot-paper, and in support of this statement he added that the polling officer made a cross in the parentage column of the entry no. 4121 contained in the voters' list for ward no. 7. This list was produced before us and we found that it bore out his statement. Radha Kishan, who has also been examined as a witness on behalf of the petitioner, clearly stated that he pointed out the discrepancy of his own accord. Now it appears to us that the

existence of the cross in the parentage column of the voters' list is a material fact which shatters the theory of personation. If the cross was made under the circumstances mentioned by Radha Kishan and Ram Kishore it is obvious that no question of personation arises at all, for no attempt was made to secure the ballot-paper in the name of Radhe Lal, son of Chhote Lal."

Finally, the Commissioners recorded the following opinion :—

"What we are primarily concerned with is not whether the disputed entry does or does not refer to Radhe Lal, son of Chhote Lal, but whether Radha Kishan and the respondent's agent did or did not honestly believe that the said entry referred to the former and entitled him to vote. We can only repeat that, after a consideration of all the points that arise in the case, we are convinced that, in applying for a voting paper, Radha Kishan had no corrupt motive but that he shared with the respondent's agents the belief that he was entitled to vote."

In an earlier part of the report the Commissioners stated :—

"We have considered the cumulative effect of the discrepancies referred to by the petitioner and we are not prepared to hold that their existence is by any means inconsistent with a *bonâ fide* belief in the mind of Radha Kishan and the respondent's agent that the former had a right to vote, whereas his conduct before the polling officer which we have discussed above is, to our minds, quite inconsistent with the idea of personation."

The facts relating to the second instance were very simple and for the most part undisputed. One Kunwar Bahadur had his name registered on two separate electoral rolls relating to two separate polling areas or wards. The polling station for the voters of both these wards was set up at the W.I.M. High School. This polling station contained four separate polling booths. Kunwar Bahadur first recorded his vote at one of these booths, and shortly after proceeded to another booth just opposite to the first and made an application for a second ballot-paper. The petitioner's case was that one of the polling agents of the defeated candidate having received information of the fact raised an objection before the polling officer who made inquiries and, finding that Kunwar Bahadur had already cast a vote, refused to issue a second ballot-paper to him. "The evidence bearing on this instance is very meagre. There is nothing but the statement of Manohar Lal to which we can turn for the exact circumstances under which Kunwar Bahadur applied for a second ballot-paper. Taking into consideration the fact that Kunwar Bahadur is a practising Mukhtar, it is not easy for us to hold that he made the second application in the *bonâ fide* belief that he was entitled to two votes because his name happened to be recorded in two separate electoral rolls relating to two separate wards. But as he has not been examined as a witness on either side and we have not considered it

necessary to ask him to explain his conduct, we are not prepared to say anything more than that his conduct is open to grave suspicion. The real question for decision is whether there was any connivance on the part of the respondent or his agent. On this point there is nothing but the evidence of Fateh Bahadur who identified Kunwar Bahadur on both occasions. The argument on behalf of the petitioner is that this Fateh Bahadur should be deemed to have been an agent of the respondent. We see no sufficient reason for accepting it. Fateh Bahadur clearly states that he had no sort of authority express or implied for identifying the voters on behalf of the respondents, but he did so simply because he sympathized with the respondent. The petitioner has led no evidence to prove that this Fateh Bahadur did anything else for the respondent except identify some voters on the polling day. We are not prepared merely on the basis of this solitary act, to hold that Fateh Bahadur was the respondent's agent. Moreover, the evidence indicates that it was the respondent's agent himself Babu Lekhraj, wakil, who discovered the mistake and prevented Kunwar Bahadur's second vote being cast.

"It is clear therefore that even if we had held that Kunwar Bahadur's conduct amounted to a corrupt practice, still we could not have saddled the respondent with any responsibility."

CASE No. XX

Bareilly City (N.-M.U.) 1927

BABU CHAIL BIHARI KAPUR *Petitioner,*

versus

RAI BAHADUR BABU SHYAM SUNDAR LAL *Respondent.*

An Honorary Magistrate is not an "official" within the meaning of section 134 of the Government of India Act. The request for votes while in Court was not held to be undue influence.

Personation, if committed without the knowledge or connivance of the candidate or his agents, will not avoid the election. Evidence regarding defamatory statement and its publication discussed. The concealment of the expenditure incurred in publication of the statement criticized. The return of election expenses held to be fabricated. A "false" return means a deliberately incorrect return, or, in other words, corrupt motive.

THE petition contained a very large number of charges of personation, undue influence, bribery and the publication of false statements. It challenged the validity of the respondent's nomination, because the latter was a special magistrate and should therefore be considered a Government official. Lastly, it was urged that the return of election expenditure filed by the respondent was false in material particulars.

The Commissioners held that the nomination of the respondent was valid.

"The issue is based on the allegation that respondent is a special magistrate and must therefore be considered a Government official. Section 80-B of the Government of India Act on which reliance is placed is to the effect that an 'official' shall not be qualified for election as member of a Local Legislative Council. The term 'official' is defined in section 134 of the Government of India Act: 'The expressions "official" and "non-official" where used in relation to any person, mean respectively a person who is or is not in the civil and military service of the Crown in India. Provided that rules under this Act may provide for the holders of such offices as may be specified in the rules not being treated for the purposes of this Act, or any of them, as officials'. Rule 2 made under the said section lays down that the holder of any office in the civil or military service of the Crown, which does not involve both of the following incidents, namely, that the incumbent (a) is a whole-time servant of the Government, and (b) is remunerated either by salary or fees, shall not be treated as an official for any of the purposes of the Government of India Act. It follows that respondent who is an Honorary Magistrate and not a whole-time Government servant does not come within the prohibition of section 80-B of the Act."

Evidence was given to support two charges of bribery neither of which were proved. Ten instances were given of alleged exercise of undue influence. They included the assertion that the respondent canvassed in open court, and that this act of his constituted an attempt to interfere with the free exercise of their electoral right by the voters and amounted in law to general exercise of undue influence.

Petitioner examined three witnesses on this point. "The first is Brijbasi Lal. Mukhtar Brijbasi Lal says that he went to respondent's court in a case and the latter asked him to make endeavours on his behalf with regard to the coming election. This talk is said to have taken place in the presence of another mukhtar by the name of Brijbihari Lal who is petitioner's nephew. Brijbihari Lal has been examined as witness, but was not asked a single question in this respect. It is difficult to believe that respondent would carry on such a conversation in the presence of petitioner's own worker. Brijbasi Lal is a Kaisth and admittedly the Kaisth and Vaishya communities are not on good terms

in Bareilly. Ram Bahadur Lal, a Kaisth employee of the municipal board, is being criminally prosecuted and petitioner is appearing as his vakil. The witness admits that he is practically working under petitioner in connection with that case. Shib Sahai the second witness is also a Kaisth, but he does not say anything material to this charge. He deposes that he heard respondent speaking about the election in his court-room, in reply to questions put by others. He cannot say definitely what questions were put to respondent and what reply he gave. The third witness Lal Bahadur is also a Kaisth, and his story is that he had gone to respondent's court to enquire about the date in some case. Mukat Behari Lal, a *karinda* of the respondent, asked him to give his vote for the respondent. Respondent himself remarked that the witness was not against him. This remark was admittedly made when the latter was not holding his court. Lal Bahadur is a clerk of petitioner's vakil, Gopeshwar Babu, who is moreover related to the petitioner. The three witnesses thus appear to be partial to the petitioner, but even if believed, we do not think their evidence proves any case of undue influence.

"In this connection, we agree with the remarks in the *Habiganj* case (see page 393), made with respect to a Minister, and would adopt the reasoning given there as our own. We are not aware of any rule requiring an Honorary Magistrate to resign office before offering himself as a candidate for election. Respondent used to hold court in his own residential house and in the circumstances it was inevitable that he should to a certain extent combine canvassing with official work."

The Commissioners held that the petitioner had failed to prove a single case of bribery or undue influence.

There were 12 alleged cases of personation, in dealing with which the Commissioners took as the first point for decision the issue whether it is open to the respondent to raise the plea of good faith. "In English law a distinction is made between corrupt and illegal practices, but there is no such distinction under the Indian electoral rules. 'A corrupt practice is a thing the mind goes with. An illegal practice is a thing the Legislature is determined to prevent whether it is done honestly or dishonestly.' (Field J., in *Barrow and Furnace*: 4 O.M. & H., 77.) The definition of personation as given in section 171 (D) of the I.P.C. follows closely the definition given in the English Ballot Act. It contains no such word as 'voluntarily' to be found in section 171 (C), but some such word has been held to qualify the language of the English Act and we think that the same qualification must be read into the language of section 171 (D) I.P.C. and in the definition of personation as given in the electoral rules. This has also been the view of all the election tribunals in India with one exception. In the *Bareilly* case (see page 141), for instance, the Commissioners remark that it is a well-settled proposition of law that there can be no corrupt practice without a corrupt

motive, and that it is the duty of the petitioner to prove *mens rea* in every case. We agree with this view and hold that 'unless there be corruption and a bad mind and intention in personating it is not an offence' (*Stepney* : 4 O'M. and H., 46)

"A great deal of reliance has been placed by the petitioner on the municipal electoral roll and the municipal house list to show who are the real voters meant by the Council electoral roll. In the first place, there is no direct evidence that the Council electoral rolls were prepared from the municipal registers, although from the nature of similar mistakes in both it is possible that the municipal registers were consulted in revising the electoral roll of the Council. The municipal electoral roll of 1923 was itself prepared from the Council electoral roll of 1920, and this may be another explanation of the mistakes appearing in both of them. In the second place, according to the evidence of the executive officer of the municipality there are 50 per cent. mistakes in the house list and 30 per cent. mistakes in the municipal electoral roll. The mistakes are of every description and were commented on in a judgment of the Revenue Commissioner, dated March 26, 1926. As a result the municipal board passed a resolution on June 18, 1926, appointing a general committee to correct the mistakes. It is clear that no reliance can be placed on the municipal registers and voters would be justified in refusing to go for information to the municipal office. Besides the Council electoral roll is by itself final and conclusive and it was not incumbent on voters to go beyond the entries contained in the same.

"It was argued by respondent's learned Counsel that cases of personation can be condoned in certain circumstances under rule 44(2) of the electoral rules, and reliance was placed on *Amritsar City* case (see page 89). The observations there made seem to be based on a misreading of the rule in question. Bribery other than treating, and personation cannot be condoned at all, although an exception is made with respect to other corrupt practices in certain circumstances."

Actually after discussing the evidence in the various alleged cases of personation, the Commissioners were satisfied that personation, if any, was not committed with the knowledge or connivance of the respondent or his agents.

There were two publications which were alleged to contain false statements of fact in relation to the personal conduct of the petitioner and were reasonably calculated to prejudice the prospects of his election.

Annexure 5 is a notice headed "Sher ki khal men gidar" and is published over the name of Jagdish Saran. Objection is taken to the passage, "Aise ko vote nahin dena chahiya jo public ki khidmat hasb dil khwah raqam le kar ta ho". (Votes should not be given to one who would serve the public on receipt of cash amounts of his own liking.)

It is admitted that one Jagdish Saran is the son of respondent's *munim*. Ram Mohan Lal. Petitioner's contention is that it is the same Jagdish Saran who published the notice. There is, however, no direct evidence on the point. Rup Narain proprietor of the Mitra Press, where the notice in question was printed, says that the order was given by one Loka Mal and that Loka Mal has a son by the name of Jagdish. On the evidence as it stands it is not possible to come to any definite conclusion as to who was the publisher of annexure 5, although from the wording of the two notices it would seem that the same person was the author of both. The evidence as to the circulation of this notice is of interested witnesses and we cannot place any reliance on it.

Annexure 6 is a notice headed "Babu Chail Behari Kapur se do do baten" and is published over the name of Pandit Ram Lal. The following passage is said to be defamatory in character "Kiya jis ne Bareilly ki public ka kam hamesha apni mansha ke mutabiq raqam le kar kiya ho . . . us ko vote den". (Are we to vote for one who has been serving the public invariably on receipt of cash amounts of his own liking ?)

The publication of this notice is admitted by the respondent. It is also admitted that petitioner is not a corrupt public worker. It has been strenuously urged on the opposite side that the statement refers to the professional conduct of the petitioner as a vakil and that he is known to charge very heavy fees. It is also argued that the contrast sought to be brought out in the notice is between a person who charges fees for his work and one who is an honorary worker like the respondent. Stress is laid on the following passage towards the end of the notice, "Is it not a fact that after entering the Council you have doubled your fees; is it now your intention to redouble them?" This passage is however so disconnected from the other, being found almost at the end of a long notice, while the alleged defamatory statement is at the very beginning, that an ordinary person would not in our opinion think that they both refer to one and the same subject. We are here considering the case of an ordinary voter who did not know the petitioner from before. In his case the insinuation contained in the passage objected to would certainly prejudice him against the petitioner. After reading the whole of the notice carefully, we have come to the conclusion that the statement in question is defamatory in character, and that it is reasonably calculated to prejudice the prospects of petitioner's election.

The question still remains as to who published the notice and whether it was published by the respondent or his agent or by any other person with the connivance of the respondent or his agent. The evidence of Ramratan Padha shows that Pandit Ram Lal of Garhaiya published the notice. It was Ram Lal himself who told the witness that he had published it. Ram Lal died at respondent's house on the day of election.

Ramratan Padha is respondent's priest and voted for him. We have no reason whatever to disbelieve his testimony. Babu Onkar Nath, vakil, who was respondent's agent and canvassed for him deposes that Ram Lal was respondent's sympathizer. He cannot say if Ram Lal took an active part in the election campaign in favour of the respondent. We are afraid Babu Onkar Nath has not told us the whole truth. If he was a worker himself, he should have known what other persons canvassed for respondent before the election. Respondent admits that Ram Lal was his sympathizer and wanted to do his work. This fact could not very well be denied in view of the circumstance than on the eve of the election Ram Lal had gone to respondent's house and that he died there the next morning. It is in the evidence both of Pandit Ramratan Padha and of Babu Onkar Nath that they had seen Ram Lal at respondent's house once or twice in the course of the election campaign. It is also proved that Ram Lal was the priest of the family of respondent's cousin. There is thus every reason to think that Ram Lal was an active worker of the respondent. All the workers were called to respondent's house on the evening of November 25, 1926.

Work was being distributed amongst them, as the next day was fixed for election. Respondent says that he retired for the night before any of the workers had left. Why should Ram Lal remain behind after respondent had gone and even after all the workers had left the place? No explanation is forthcoming. There is also no explanation why Ram Lal went to sleep in the upper storey of respondent's house. In the absence of any evidence we can but come to one conclusion and that is that Ram Lal was not only a worker but one of the principal workers of the respondent. He remained behind in order that he might be up and early to begin his allotted work on the election day. If he was ill, there was all the more reason for him to have gone home at night seeing that his residence is not far from respondent's house. Dr. Basant Kumar who examined Ram Lal's dead body certified to the police that in his opinion Ram Lal had died a natural death which was probably due to heart failure.

From a perusal of the notice there can be no doubt that it was issued solely in the interests of the respondent. Respondent himself says that he saw it for the first time at 2 or 3 P.M. on the polling day, but his agent Babu Onkar Nath deposes that he had seen it before November 26, 1926, in the course of the election campaign. We are not prepared to believe that if Ram Lal had published the notice, the fact did not come to respondent's knowledge before the day of election. Admittedly Ram Lal was an over-zealous supporter of the respondent. Can it be supposed for a moment that he would omit to mention to him the fact of the publication? Neither respondent nor his agent Babu Onkar Nath repudiated the statement made in the notice. Apart from

other considerations this would in our opinion amount to connivance on their part.

We do not attach any importance to the evidence of witnesses who depose about the distribution of the notice, nor of those witnesses who say that Ram Lal went about canvassing with respondent or his son, because all of them are biased in favour of the petitioner. There is, however, one other circumstance which goes very strongly to support our conclusion. We shall show when dealing with the next issue how false accounts have been deliberately filed in court on behalf of the respondent. Respondent had in his possession evidence which could have rebutted the case set up by the petitioner. The original accounts, if filed, could have proved the respondent did not bear the printing and publication charges of Ram Lal's notice. We think we are entitled to presume in the circumstances that this expenditure has been deliberately concealed so that Ram Lal's agency may not be proved. Rup Narain, proprietor of the Mitra Press, deposes that one Girja Prasad gave the order for Ram Lal's notice and also paid for the printing. Girja Prasad was summoned as a witness by respondent, but was not examined. The original accounts, if produced, could have disproved the fact that Girja Prasad did not make the payment on behalf of the respondent.

As regards the publications the Commissioners found that two did not bear the address of the publishers, but that the petitioner failed to prove that the result of the election was materially affected by the omission.

The last issue was whether the return of election expenses filed by the respondent was false in material particulars.

The word "false" used in rule 5(4) of the electoral rules¹ indicates that the return of election expenses must be proved to be deliberately incorrect. In other words corrupt motive must be shown. The motive may be to omit legitimate expenses from the return where a maximum scale has been fixed by the Governor-General in Council under rule 20 of the electoral rules, or the intention may be to conceal expenditure which would go to prove some other corrupt practices. Under rule 21 of the electoral rules every election agent is required to keep separate and regular books of account in which their particulars of all expenditure incurred in connection with the candidature should be entered. We agree with respondent's learned advocate that where regular books of account have not been kept, it does not necessarily follow that all the particulars entered in the return of election expenses must be false. Petitioner is bound to prove the falsity of the items enumerated by him in his petition.

There are altogether 18 particulars in the list attached to the petition. As regards most of them, petitioner produced no evidence and some

¹ Now paragraph 5 of part IV of the Corrupt Practices Order, 1936.

were given up at the time of argument. The following need more than a passing notice :—

F. 7.—Cost of pitching tents at the polling station.

This was done by permanent servants and not by men hired for the occasion. Respondent incurred no extra expenditure in this connection.

F. 18.—Price of motor-car purchased in October last and used in the election campaign.

It is admitted that a motor was purchased, but the evidence is that it was purchased for the use of the joint family. The purchase was made in place of a carriage and pair which were sold at the time. Perhaps the cost should have been apportioned and a part included in the return of election expenses, but we do not think there was any bad faith on the part of the respondent.

F. 13.—Travelling expenses of respondent's brother B. Ram Gopal, Deputy Collector, who came to vote from Shahjahanpur and the travelling expenses of other voters who came from outstations for the same purpose.

According to rule 19 of the electoral rules the return should show expenses incurred on account of or in respect of "the conduct and management of the election". We do not think the travelling expenses of voters would come under this description. We think the expenses to be included in the return are those which would otherwise be paid by the candidate. A candidate is not permitted to pay for the conveyance of any elector to the polling station, for that by itself is a corrupt practice under part II of schedule V.

F.-1 and F.-18.—We now come to the three publications, annexure 14, annexure 5 and annexure 6. The last two have already been dealt with in issue no. 5. There is no proof that respondent had any knowledge as to who issued the notice annexure 5. Even if he had such knowledge he was not bound to show the printing charges of a notice which on the face of it was defamatory unless he had recognized the publisher as his agent. Notice annexure 14 was published over the name of one Ram Das. From the contents it is clear that the notice was issued by the Congress party who had a candidate of their own and the notice itself was in reply to a similar notice published by the petitioner. Respondent could not include the cost of printing annexure 14 in his return of election expenses. We have already found that annexure 6 was published by respondent's agent Ram Lal and with his knowledge and connivance.

Respondent's account-book of election expenses was summoned by the petitioner and produced in court. It consists of only nine pages and there can be no doubt that it has been fabricated. In some entries the year 1927 was at first entered and was subsequently corrected to 1926 and in others 1927 stands uncorrected. An accountant writing the book in 1926 could not possibly have made such a mistake about the year.

There is one entry in which the month "April" is written instead of "October". This would go to show that the book was prepared shortly before the petition came up for hearing. Respondent in his cross-examination admitted that the entries in the book are all in the handwriting of his clerk Mathra Prasad. He persisted in saying so after the wrong month and year were pointed out to him. Even now it is not denied that the book was really written by Mathra Prasad, but an attempt has been made to show that it was subsequently manipulated by the court clerk who happens to be a Khatri like the petitioner. We do not think there is any foundation for this allegation. No reason is shown why Mathra Prasad who is still in respondent's service should act in collusion with the petitioner or his men. It is said that Mathra Prasad is evading service of summons, but no proper attempt has been made on behalf of respondent to secure his attendance. As soon as the falsity of the account-book came to light during the cross-examination of respondent, his pleader produced a second book after an hour or two before one of Commissioners to show that the original had been tampered with while in court. This second book which is without any mistake is said to be a copy of the first and meant for the use of respondent's pleaders. In our opinion there was absolutely no reason why a copy should be kept at all. The production of this so-called copy goes rather to strengthen the theory that the original (exhibit N) is also a fabricated one. It seems that exhibit N was first prepared, but there were so many mistakes in it that a second copy was considered necessary. The so-called copy was then prepared with great care and a corresponding ledger, as would appear from the entries in the book, was also made up. The copy has the clear appearance of having been written at one and the same time. A third account-book was probably then ordered to be made. Mathra Prasad was either too lazy to write it, or if he wrote one, the first book (exhibit N) was filed in court by mistake. We have every reason to suppose that respondent has a regular account-book of his election expenses. He belongs to a big firm of bankers where a number of *munims* are employed and regular account-books are maintained. The original account-book has not however been produced, because we presume there are entries in it which would go against the respondent. As we remarked in discussing issue no. 5, the cost of printing annexure 6 probably has a place in it. There may be other illegitimate expenses in the original but with them we are not concerned.

We find on this issue that the return of election expenses is deliberately incorrect in at least one material particular, viz. Rs. 13, the cost of printing notice, annexure 6.

To sum up: We find that of all the charges brought by the petitioner only the publication of one *false* statement in the circular "Chail Bihari Kapur se do do baten" has been proved and that the return of

election expenses is false so far as the cost of printing this notice is concerned. We accordingly report to His Excellency the Governor that the election of the respondent is void under rule 44(b) of the United Provinces electoral rules and that he has further incurred the disability under rule 5(4).

As to costs, it may be observed that reckless allegations have been made which the petitioner had from the outset no hope of substantiating by any evidence. In some cases the charges are entirely disproved. We, therefore, recommend that parties bear their own costs of this enquiry.

Finally, we would point out that there is a difference in the view of the various election tribunals as to whether fresh instances of a corrupt practice can be added under rule 33 by way of amendment. The Commissioners in this very case have not been unanimous on the point. We would suggest that the rule be again so altered as to make it clear whether the addition of further instances of a corrupt practice should be permitted after the petition has been presented.

CASE No. XXI

Bengal Marwari Association, 1924

(INDIAN LEGISLATIVE ASSEMBLY.)

RAI BAHADUR BISWESWARLAL HALWASYA .. *Petitioner,*

versus

BABU RANG LAL JAJODIA *Respondent.*

A returning officer (if he is not debarred) by reason of being a Government servant can stand as a candidate, but must refrain from doing anything in his capacity as returning officer.

The proposer or seconder of a nomination must be an individual person, a natural person who may represent a firm.

An Election Court of Inquiry can enquire whether a proposer or seconder (and it would seem *a fortiori* a candidate) is disenfranchised by statute.

THE facts leading up to the present election petition are as follows : The Bengal Marwari Association of Calcutta, an Indian Commerce special constituency was called upon to elect a member to the said Legislative Assembly. The 8th October, 1923 was fixed as the date for the nomination of candidates, and 11th October, 1923 as the date for the scrutiny of the nominations for the said constituency. Babu Rang Lal Jajodia was the joint secretary of the Marwari Association. The joint secretary of the Marwari Association was specified in the second column of schedule I of the Bengal Legislative Assembly electoral regulations as the returning officer. The personal assistant to secretary, Bengal Marwari Association, was specified in the third column of schedule I as the person authorized to perform all or any of the function of the returning officer. It appears that Babu Rang Lal Jajodia was also the registering authority and the electoral rolls were originally prepared by him. In the Marwari Association, firms and companies are members, and many of these were put on the electoral roll. Apparently about two-thirds of the names, roughly speaking, on the roll are those of firms, while the remaining names are those of individuals. On the 7th October Babu Rang Lal Jajodia resigned his office as joint secretary of the Marwari Association. He sent also a telegram to the Government of Bengal resigning his office as returning officer. On the 8th October there were only two candidates, the petitioner and the respondent Babu Rang Lal Jajodia. The nomination papers were received by the personal assistant to the secretary. The nomination paper of the petitioner Rai Bahadur Bisweswarlal Halwasya was subscribed by himself. The proposer and seconder were however two firms whose names appeared on the electoral roll, viz. Messrs. Hurmukhrai Sanairam and Messrs. Shewdayal Ramjeedas. The senior partners of these firms signed the names of the firms on the nomination paper. On the 11th—the date of the scrutiny—objection was raised by the respondent that the petitioner's nomination was bad inasmuch as the nomination paper had been subscribed by two firms, and not by individuals as proposer and seconder. The petitioner in his turn challenged the nomination of the respondent on the ground that, the latter himself being the returning officer of the constituency, he was not eligible to stand as a candidate. Babu Jatindranath Banerjee, the personal assistant to the secretary, Marwari Association, overruled the objection of the petitioner, and upheld the objection of the respondent, and he declared Babu Rang Lal Jajodia as duly elected from the constituency. The petitioner thereafter filed his present application. His contention is that firms can be electors and can vote, and firms can nominate a candidate for election. It is also pleaded that the respondent was not entitled to resign his office and stand as a candidate. It is further contended that if he could and did resign, the constituency was

without a returning officer, and that therefore Babu Jatindranath Banerjee acted without jurisdiction. It is pointed out that the Bengal Government had no authority in this election matter and the telegram to the Government of Bengal is of no value. It is shown that the office of the returning officer was not filled up by the Government of India till the 27th October, 1923. It was stated that the office of the joint secretary of the Marwari Association has not yet been filled up, and it was argued that the Marwari Association had not accepted the resignation of Babu Rang Lal Jajodia. It does not seem that the acceptance of resignation is necessary. Subject to any provisions in the rules to the contrary, a member may resign at any time and he ceases to be a member (Halsbury, vol. IV, page 414) (1896, 1 Chancery, page 409). Questions may arise about his liability but that is a different matter. It was not shown that there is anything in the rules of the Marwari Association which prevented the respondent from resigning his office as joint secretary. He was appointed returning officer not by name but by virtue of his office. Our conclusion therefore is that Babu Rang Lal Jajodia ceased to be a returning officer after the 7th October.

There is nothing in our electoral rules and regulations which bars a returning officer from standing as a candidate. The matter has been placed on a statutory basis now in England and perhaps this should be done in India. The rule is that when a returning officer stands as a candidate he must refrain from doing anything in such capacity. It is not said that the respondent did any act as returning officer after his resignation. It may be said that he should have resigned before. Parker at page 6, summarizes the English Law—"If all the duties of returning officer are discharged by the acting returning officer the former is not disqualified for being a candidate by reason of being returning officer." Our answer therefore is in the affirmative.

There was no returning officer on the 8th October, 1923 in this constituency. Under schedule I of the regulations, however, Jatindranath Banerjee was empowered to do all the duties of the returning officer. It is pointed out that under regulation 3 he could only act under the control of the returning officer and that he could not receive nomination papers and hold a scrutiny unless the returning officer was "unavoidably prevented" from performing these functions. The words in an English case were "incapable of acting" and Lord Campbell thought that they might cover a case of this kind. (*Queen vs. Owens*, vol. 121, English Reports, page 36.) The personal assistant had not usurped the office. He took up his duties when the returning officer became incapable of acting. "Want of title in the person acting as returning officer will not vitiate an election which is otherwise valid" (Parker, page 61). "Elections made under usurping returning officers when there has been the form of an election have been uniformly supported" (Heyw Bo. 62).

Turning to the Bengal electoral rules it would appear that non-compliance with the rules and regulations is not enough. The petitioner has to show that the result of the election has been materially affected by such non-compliance. If the petitioner's nomination was bad, his name goes out on that ground. If the nomination was good he succeeds on that ground and not by reason of the fact that the personal assistant acted as the returning officer. We hold therefore that the petitioner cannot succeed on this ground.

It was argued that firms are members of the Marwari Association and that schedule II, paragraph 9 does not exclude firms. We must however read the schedule II along with the other rules and they clearly lay down that it must be a natural person representing the firm who can be on the electoral roll or who can exercise the right to vote and to nominate. The disqualifications mentioned in rule 7 can be predicated only of a natural person and rule 7, governs rule 8(2). The learned vakil is forced to concede that the candidate for election must be a natural person seeing that he must give his own name and his father's name and state his age and when elected he must take the oath. The cases of the elector and the proposer and the seconder stand on the same footing. We think that the word "person" has the same meaning in all these rules and regulations and that it means a natural person. Rule 11(4) lays down that "any person whose name is registered in the electoral roll of the constituency and *who is not subject to any disability stated in rule 7* may subscribe, as proposer and seconder . . . ' In the present case the proposer and seconder were firms. We hold that they must be individuals or natural persons. The nomination paper of the petitioner was not in order and we think it was rightly rejected.

The learned vakil contended that the electoral roll was final not only for the returning officer but also for this court and he referred to regulation 20(2), and to the case of *Stowe vs. Joliffe*. The last case merely is an authority for the proposition that the election court cannot go behind the electoral roll in considering the qualifications. It is open to the court, and it is the function of the court to see whether disenfranchisement would occur in the cases of persons prohibited from voting, etc. by the statute. Regulation 20 does not stand in our way. Regulation 20 (2) (a) is explicit and we have still to see whether the proposer and seconder is disqualified under sub-rule (4) of rule 11. To say that we are concluded by regulation 20 is simply to beg the question as to whether a firm is an elector.

The authorities who framed the electoral rolls in these Commerce and Industry constituencies apparently proceeded upon the fact that because firms and companies were members of the Chamber or Association they were entitled to be on the electoral roll. We have examined the rules and regulations from every point of view, and the

conclusion is irresistible that it was not contemplated by the legislature that an elector can be other than an individual, and that it was intended that the firms would exercise their franchise through a member or partner or representative who would be on the electoral roll.

Our conclusion therefore is that the nomination paper of the petitioner was rightly rejected and the respondent, the returned candidate, was duly elected.

CASE No. XXII

Bhagalpur North (N.-M.R.) 1921

BABU VISHWANATH JHA *Petitioner,*

versus

SWAMI VIDYANAND *alias* BISEWABHARAN PRASHAD *Respondent.*

An election court upon scrutiny will consider only questions of personal and not of material disqualification. The order of the revising authority is final, and a Court of Enquiry is precluded from enquiring into the question of possession of necessary qualifications as a voter.

To advertise that a candidate is a *chela* of Mr. Gandhi is not a corrupt practice ; but if such statement were in fact a misrepresentation it would constitute a fraud and therefore a corrupt practice under the provisions of rule 2 part I of the fourth schedule (now section 2 (a) (ii) of part I of the first schedule of the Corrupt Practices Order, 1936).

By this petition it is sought to set aside the election of the respondent to the Bihar and Orissa Legislative Council by the non-Muhammadan rural constituency of North Bhagalpur.

The respondent was elected by a majority of about 800. He obtained some 1,100 votes. The next candidate, Babu Tribeni Prasad Singh, polled about 300 votes. Babu Satyabrata Chattarji and the Raja of Supaul about 200 each and the petitioner about 100. There were two other candidates each of whom polled under 100 votes.

The petitioner assails the election upon three grounds set forth in paragraph 17 of his petition. The third ground which alleges irregularity in the reception and refusal of votes has been given up, and no evidence was offered in support of it. The first ground is stated as follows :—

“ For that the respondent is not a voter and was as such ineligible for election.” Now section 6 (1) (a) of the election rules lays down that no person shall be eligible for election unless his name is registered on the electoral roll of the constituency or of any other constituency in the province. The respondent is admittedly registered on the electoral roll of the constituency of Saran within this province, but the form of the petitioner's argument before us was that the respondent had been wrongly so registered. There was no suggestion of any failure to comply with the formal procedure enjoined by the rules and regulations regarding the preparation of the electoral roll in question and its revision by the revising authority. The contention was that the respondent had been wrongly registered because he did not possess the material qualifications specified in the second schedule of the rules. Now rule 9(3) provides that the orders made by the revising authority shall be final. It was argued however on the petitioner's behalf that under the provisions of rule 42 this court has jurisdiction to enquire into and decide the question whether the respondent possessed the qualifications specified in the schedule. Reference was also made to the English law upon the point, and to a decision of the Commissioners in the matter of an election petition by Babu Sashi Bhusan Konar printed at page 5 of the *Bihar and Orissa Gazette, Extraordinary*, dated 14th January, 1921.¹ It was also pointed out that under rule 9(1) the petitioner not being a voter of the Saran constituency was precluded from raising any objection to the inclusion of the respondent's name before the revising authority.

Upon the last point all that we need say is that we presume that the legislature contemplated that sufficient safeguard would be provided by confining the power of objection to the voters of the constituency. With the law of England we are not concerned since our jurisdiction is defined by the election rules. We may however point out that even

¹ The *Purnea* case.

under that law an election court upon scrutiny will consider only questions of personal and not of material disqualification. The disqualification alleged before us is of the latter description. Rule 42 no doubt provides *inter alia* that if in the opinion of the Commissioners the result of the election has been materially affected by any non-compliance with the provisions of the Act or the rules and regulations made thereunder, the election of the returned candidate shall be void. But the jurisdiction thereby granted is necessarily limited by the definite provisions of rule 9(3) regarding the finality of the order of the revising officer, and we are satisfied that under this rule we are precluded from enquiring into the question of the respondent's possession of the necessary qualifications as a voter. We are confirmed in this view by the conviction that the legislature cannot have contemplated the provision of the cumbrous and elaborate procedure of an election commission to determine simple questions of fact concerning the possession of such qualifications. Accordingly we declined to hear evidence upon this point.

The petition has accordingly been contested only upon the second ground which alleges corrupt practice by the respondent. The petitioner's allegations upon this point take the following form :—

It is stated that about February, 1920, the respondent held meetings at Naubakar and other places within the constituency and made speeches, in the course of which he asserted that he was a *chela* of Mr. Gandhi and was touring under Mr. Gandhi's directions in order to benefit the tenants and redress their grievances ; that he had assisted Mr. Gandhi in procuring redress of their grievances for the tenants of Champaran ; and that he would try and do the same for the Bhagalpur tenants by bringing Mr. Gandhi there. Then during the month of November previous to the polling the respondent, his agent and sub-agents held a number of meetings at which they informed the voters that the respondent was standing under Mr. Gandhi's orders in the interest of the tenants and that if they failed to vote for him the curse of Mr. Gandhi would fall upon them. It is stated that similar statements were made by the respondent, his agent and sub-agents to voters personally canvassed by them.

There is ample evidence and it is freely admitted by the other side that Mr. Gandhi is regarded by the voters as a Mahatma and that obedience to his wishes is considered to be a pious duty. There is evidence that at a public meeting held in Laheria Sarai in December last after the election Mr. Gandhi disavowed all connection with the respondent, and it is self-evident from the nature of Mr. Gandhi's doctrine regarding non-co-operation that the respondent's candidature cannot have had his support. There can be no doubt that if, as alleged, votes were obtained by the respondent upon these misrepresentations the act would

constitute a fraud and therefore a corrupt practice under the provisions of rule 2, part I, of the fourth schedule.

The respondent denies that he made any of the representations alleged, and he had called amongst others 24 voter witnesses who support him upon this point, and assert that they voted for him on account of the work which he was doing on their behalf.

In support of the petition 73 witnesses have been examined. Sixty of these are voters and with one or two exceptions they are tenants of the Darbhanga Raj, half of them being *jeth-raiyats* of the Raj. No less than 42 of these witnesses deposed as to the Naubakar meeting of February, 1920. Fifteen of them deposed regarding other meetings held by the respondent at about that time. The witnesses also gave evidence regarding about a dozen meetings held by the respondent and his agents in November before the polling. There is also evidence as to personal canvass by the respondent and his agents. The witnesses generally agree regarding the nature of the misrepresentations made by and on behalf of the respondent and allege that they voted for the respondent because they believed him to be a *chela* of Mr. Gandhi and standing under Mr. Gandhi's orders and because they feared the Mahatma's curse.

Six witnesses of more respectable position have been called to corroborate this evidence. The first of these, Md. Issac, is a petty zamindar. He states that a few days before the election he heard the respondent deliver a speech in the course of which he stated that he was a *chela* of Mr. Gandhi and that the tenants should vote for him if they did not wish to incur the Mahatma's curse. The witness stated that he believed the respondent's representation that he was Mr. Gandhi's *chela*. But in cross-examination he admitted that he did not credit the respondent's assertion because it was not consistent with the doctrine of non-co-operation which the witness was aware that Mr. Gandhi was then preaching.

The next witness, Kazi Ashraf Hossain, a zamindar and mukhtar, states merely that in November he heard the respondent deliver a speech in the course of which he claimed to be Mr. Gandhi's *chela*.

The petitioner himself states that in course of a private conversation with the respondent in July last the latter informed him that he was Mr. Gandhi's *chela* and a *sanyasi*. It seems difficult to understand what motive could have actuated the respondent in volunteering these assertions to the petitioner.

The next witness, Mr. Walze, a mukhtar of Darbhanga, stated that he was the respondent in the court compound at Madhubani a year ago. Hearing him described as Mr. Gandhi's *chela* the witness remarked that Mr. Gandhi was preaching anarchy. Asked to express in the vernacular what he had actually said Mr. Walze replied, "I said that Mr. Gandhi was

preaching against Government (*Government ki khelaf*) and spoiling (*begarta*) the raiyats ". To this observation Mr. Walze tells us that the respondent without attempting to controvert it merely replied, " Do not speak thus about my guru ". The evidence of this witness did not in our opinion carry conviction.

The next witness, Dwarka Nath Thakur, was a candidate in this constituency. He asserted that in the course of a private conversation with the respondent a few days before the polling the latter informed him that he was Mr. Gandhi's *chela*. He also in common with witnesses Kazi Ashraf Hossain and Babu Tribeni Prasad Singh gives an account of a speech made by the respondent at a meeting at Supaul shortly before the polling. The account given by these three witnesses is discrepant. But it is noteworthy that none of them ventured to assert that the respondent, when demanding the electors' support and asserting that he was Mr. Gandhi's *chela*, threatened them with the displeasure of the latter in case of their disobedience. From the cross-examination of Babu Dwarka Nath Thakur we gather that his memory is by no means reliable.

Babu Tribeni Prasad Singh, who was also a candidate, states that he informed the voters that the respondent was not Mr. Gandhi's *chela* and the reply which they made was that they believed the respondent to be Mr. Gandhi's *chela* because some of them had been to the Amritsar Congress and had there obtained reliable information to that effect.

It is also proved that the respondent was in the habit of wearing the garb of a *sanyasi*, and the petitioner strongly relies upon this circumstance in combination with the adoption by the respondent of the title Swami as indicating that the respondent was deliberately supporting his allegation of *chelaship* by the adoption of the garb and title of a religious devotee.

Further corroborative evidence is sought in the fact that as shown by the evidence of the deputy presiding officers at Degmara and Supaul certain voters enquired for " Gandhiji's box ", that some of them described the respondent as " Gandhi's *chela* ", that some of them on approaching that ballot-box took off their shoes and made obeisance to it and by other evidence that at the conclusion of polling there were shouts of " Gandhiji ki jai ". It appears from this evidence that only one or two voters at Degmara and only one at Supaul enquired for " Gandhiji's box ". Now the evidence of the voter witnesses is to the effect that they were instructed by the respondent and his agents to vote in " Gandhiji's box " the colour of which was red. It seems to us therefore that if that evidence were true a much larger number of voters would have made enquiries from these officers as to which box was Gandhiji's. Moreover the fact that a very limited number of voters believed that the

ballot-box was "Gandhiji's" would certainly not go far to establish the petitioner's case that it was the respondent himself who put about this misrepresentation.

The next observation which we desire to make is that even if the respondent did assert that he was a *chela* of Mr. Gandhi that assertion would not necessarily involve any fraud. Any person who like the respondent is a reverential admirer of Mr. Gandhi and to a large extent in agreement with his teaching might very reasonably describe himself as his *chela*, meaning thereby no more than that he was his follower and admirer. The case put forward by the petitioner is of a quite different character. It is that the respondent gave himself out to be a *sanyasi* and asserted a spiritual *chelaship* and therefore possessed the authority of the Mahatma to invoke the latter's curse upon disobedience. This case appears to us to be altogether inconsistent with the fact generally admitted by the petitioner's witnesses that for some weeks previous to the polling the respondent was not wearing the garb of a *sanyasi* but the usual dress in which he appeared in court. It is evident that had the respondent actually posed as a *sanyasi* he could have no possible motive for arousing suspicion by doing away with his *sanyasi* dress at the very time when he was setting up a spiritual *chelaship* which gave him authority to invoke his guru's curse.

We cannot accept the petitioner's suggestion that the fact that the respondent called himself Swami and at the outset wore *sanyasi* dress, indicates that these were assumptions intended to support the allegation of *chelaship*. The respondent had been a wanderer for many years and had severed his relations with his family. When he reappeared in his village and before he inaugurated his campaign amongst the tenants in Bhagalpur he was in *sanyasi* dress. He subsequently resumed his relations with his family. This is clear from the evidence of a resident of the respondent's village, one Ram Charita Lal, who deposed for the petitioner. In our opinion there is nothing to indicate that the dress and title were assumed in order to support the allegation of *chelaship*. We think that they were probably maintained by the respondent because they would naturally created confidence in the disinterested nature of the work which he had undertaken on the tenants' behalf.

We have already noticed the evidence that at the Naubakar and other meetings of February, 1920 the respondent asserted that he was Mr. Gandhi's *chela* and had assisted him in the Champaran agitation. There is no reason to doubt the respondent's statement that he took no part whatever in that agitation. It seems highly improbable that the respondent should have invented these two falsities. Obviously there was considerable danger that the imposture would be exposed during the nine months which preceded the election and in that case the influence

which the respondent was seeking to acquire over the tenants would necessarily disappear.

It is a remarkable circumstance that no attempt was made to corroborate the 42 voter witnesses who deposed to the Naubakar meeting by the evidence of an independent and highly respectable witness who was present at that meeting. This gentleman, who is a Sub-Deputy Collector, Babu Janaki Prashad Singh, attended the meeting under the orders of the Collector. He deposes that the respondent addressed the meeting regarding the grievances of the tenants. There is no doubt that if the respondent made the misrepresentations alleged this witness must have heard them. His evidence therefore amounts to an implicit contradiction of the evidence of the voter witnesses. We are justified therefore in regarding their evidence with extreme suspicion.

Witnesses who were questioned as to their reasons for accepting the statements alleged to have been made by the respondent regarding his connection with Mr. Gandhi stated that they had been assured by Suresh Chandra Laha, respondent's agent and Darbari Mander, Hiralal Potdar and others, the respondent's sub-agents, who had visited the Amritsar Congress of December, 1919 in company with the respondent, that they had been informed by Mr. Gandhi personally that the respondent was his *chela*. Now these persons are all tenants of the Darbhanga Raj. Suresh Chandra Laha, Darbari and Hiralal are wealthy and influential men amongst the tenants. Their interests necessarily are those of the tenants in general, that is to say they are anxious for redress of their grievances and they desire to have their own nominee in the Council to promote their interests as tenants. Yet the petitioner's case necessarily is that these men entered into a conspiracy with the respondent against their own interests in order to deceive their co-tenants into the belief that the respondent was Mr. Gandhi's *chela*. No possible motive for such conduct has been suggested or is conceivable. It is evident that if the respondent had proposed such a conspiracy these persons in their own interests would have immediately repudiated him as a cheat.

Then the story that the respondent during the month preceding the election was claiming that his candidature as Mr. Gandhi's *chela* was being supported by Mr. Gandhi himself is of a highly improbable character. For some months past Mr. Gandhi had been preaching non-co-operation and this question had been debated at the Bhagalpur Conference held in September. There is no doubt from the evidence of witnesses Kazi Ashraf Hossain and Md. Issac and that of the petitioner himself, that the doctrine of non-co-operation in the shape of abstention from voting was making considerable headway amongst the tenants during the fortnight preceding the election and that there was considerable abstention from voting particularly in the Supaul thana on that account. In these circumstances we think the respondent must have realized that it would

be suicidal to insist upon these false claims at that juncture. In any case we are unable to conceive what benefit the respondent could expect to gain by procuring his election upon pretences the falsity of which must sooner or later be demonstrated to his constituents. If as the petitioner contends the respondent is a mere professional politician, it is evident that he can only attain his ends by securing and retaining the confidence of the tenants.

The voter witnesses invariably represent themselves as having supported the respondent in consequence of Mr. Gandhi's order and from fear of his curse. They deny that any sort of work was done by the respondent on the tenants' behalf. There is no doubt that this denial is wholly disingenuous. The respondent's voter witnesses assert that the respondent was interesting himself in their grievances and did actually put a stop to illegal exactions called *farmaesh* which had been habitually taken by the underlings of the Darbhanga Raj. There is no doubt that these exactions were stopped or partially stopped at or about the time when the respondent commenced his campaign amongst the Bhagalpur tenants. Whether this was due to the action of respondent or, as is contended by the petitioner, to the action of the local manager of the Raj appears to be immaterial because in any case the tenants would naturally attribute the matter to the exertions of the respondent. The Land Revenue Administration report for the year 1919-20 contains at page 15 the following paragraph: "The Collector of Bhagalpur reports that the practice of realizing illegal abwabs by the amla of Naubakar circle of the Raj Darbhanga is believed to have been checked to a considerable extent by the attitude of the tenants in refusing to pay any rent *plus* abwabs at the Raj cutchery." At page 18 of the same report there is a paragraph as follows: "In the Madhubani sub-division of Darbhanga one Swami Vidyananda toured with the declared object of informing the tenants of their rights." In the papers before us there is ample evidence to show that the respondent was actively engaged in work on behalf of the tenants. He established Kishan-sabhas, he memorialized the local officials regarding the tenants' grievances and he was engaged in instructing the tenants as to their rights and the voters as to their privileges under the reforms scheme. These circumstances offer a sufficient explanation of the strong support given by the tenants to the respondent at the election.

There is no doubt that the tenants entertain grievances against the Darbhanga Raj. Whether those grievances are well or ill-founded is no concern of ours. Necessarily however the attitude of the respondent has been antagonistic and offensive to the Raj officials, and it is admitted that the petitioner whose personal interest in this case is almost negligible has had the weight and authority of the Raj at his back during these proceedings. In these circumstances it would not be difficult to procure

the evidence given by these Raj tenants and *jeth-raiyats*. Our conclusion as to the unreliability of this evidence is confirmed by the following circumstances. It was found upon scrutiny that the ballot-papers of five of these witnesses who assert that they voted for the respondent under Mr. Gandhi's orders and for fear of his curse were actually cast for a rival candidate, Babu Tribeni Prashad Singh. It was contended for the petitioner that these ballot-papers must have been wrongly included amongst those of Tribeni Babu by the returning officer. The ballot-papers are all found carefully tied in packets of 25 and there is every indication that proper care was taken by the officer concerned. In the circumstances we are bound to assume that the counting was properly made and that these votes were cast for Tribeni Babu in whose envelope they are found. Moreover two of these persons were the nominator and seconder of another candidate, Babu Satyabrata Chatterji, there is a suggestion that one of them was taken to task on this account and there is therefore a probability that they should have voted for the Raj nominee, Tribeni Babu. The circumstances of this perjury is a strong indication of pressure put upon witnesses and of extensive resort to concoction of evidence.

For these reasons we must decline to credit the evidence adduced for the petitioner in support of the allegation of corrupt practice. In our opinion no corrupt practice has been proved and the returned candidate has been duly elected. We regard the petition as an impudent and mendacious attempt to defeat the free choice of the electors.

The respondent will be entitled to recover from the petitioner his cost which we assess at Rs. 700 (seven hundred).

CASE No. XXIII

Bombay City (M.U.) 1924

(BOMBAY LEGISLATIVE COUNCIL.)

MAHOMEDALLY ALLABUX *Petitioner,*

versus

(1) JAFFERBHOY ABDULLABHOY LALJI	..	} <i>Respondents.</i>
(2) HUSSEINALLY M. RAHIMTULLA	..	
(3) MAHOMED HUSSEIN HAVELIWALLA	..	
(4) MIRZA ALI MAHOMED KHAN	..	
(5) EBRAHIM SULLEMAN HAJI	..	

When a petitioner claims to be declared elected all the other candidates should be joined as respondents.

Further instances of the same charge (personation with connivance) can be given by amendment of particulars.

The claim of a declaration that petitioner or any other candidate has been duly elected is separable from a claim calling an election in question.

THE first two respondents were declared elected.

Respondents 3, 4 and 5 also stood for election but were not elected.

The candidates who were nominated at the election comprised the petitioner, the five respondents who have been joined as respondents in this petition and two others who have not been joined.

The names of all the candidates who stood for election together with the number of votes accorded to each appear from the following table :—

(1) Jafferbhoy Abdullabhoy	..	..	2,071
(2) Husseinally M. Rahimtulla	.	..	1,646
(3) Mahomedally Allabux	..	..	1,571
(4) Mahomed Hussein Haveliwalla	..	..	1,041
(5) Mirza Ali Mahomed Khan	..	..	943
(6) Ebrahim S. Haji	..	..	745
(7) Husseinbhoy A. Lalji	..	..	23
(8) Abdul Tyed Shaik Abdul Hussein	..	..	12

It thus appears that the difference between the number of votes polled by the petitioner and the 1st respondent was 500.

The petition calls in question the election of the 1st respondent and also claims a declaration that the petitioner has himself been duly elected.

The grounds on which the election of the 1st respondent is called in question are that the 1st respondent was guilty of the corrupt practices of personation with connivance within the meaning of clause 3, part I, of schedule 4 (as originally numbered) of the election rules, and of hiring or using public conveyances within the meaning of clause 5 of the same schedule.

The petition was accompanied by lists setting forth particulars of the corrupt practices alleged. The particulars of acts of personation were allowed to be amended by our order appended hereto and marked "B".

The allegations of personation with connivance were not proved, and the petitioner's claim was only sought to be sustained on the ground that the election of the 1st respondent was procured or induced or the result of the election was materially affected by the corrupt practice of hiring or using public conveyances.

The 1st respondent at the outset submitted that the petition could not be sustained and should be dismissed in its entirety by reason of the fact that the petitioner had omitted to join as respondents all the other candidates who were nominated at the election. This had reference to the non-joinder of the last two candidates, who, by the terms of rule 32, ought to have been joined as they had been nominated at the election.

By our ruling appended hereto and marked "C" we held that the claim by a petitioner under rule 32 to be declared duly elected is separate

and distinct from that portion of the petition which calls in question the election of the returned candidates, and that as the returned candidate alone need be joined when there is no claim to be declared elected, the petition was good in so far as it called in question the election of the 1st respondent

An application was then made by the petitioner for leave to join as respondents to the petition the two other candidates who were nominated at the election but who had not been made respondents to the petition.

By our ruling appended hereto and marked "D" we held that we had no power to order or permit such joinder.

Rule 35 directs in effect that, subject to the other provisions of the electoral rules, our procedure is to be governed by the rules of the Civil Procedure Code, which relate to the trial of suits; and section 5 of the Election Offences and Inquiries Act, 1920, confers on us the powers vested by the Civil Procedure Code in a court when trying a suit in respect of certain matters which are specifically mentioned and which do not include the joinder of fresh respondents or the amendment of the petition.

The only power of amendment is that conferred by rule 31 under which we may allow the particulars in the list of corrupt practices to be amended.

We are only appointed to report under rule 43, and in our opinion the provisions referred to show that our report is required to be on the particular petition which under rule 34 the Governor of the province sends to us for trial; and that the only manner in which other respondents may be joined in a petition is that provided by rule 34 (2) (b), under which any other candidate is entitled to be joined on giving security within fourteen days after the publication of the petition in the gazette.

No such rejoinder had been made during the time limited, and the provisions of the rule could not therefore be complied with when the application was made. Moreover, one of the candidates who were nominated but not joined did not seek to be joined.

The result is that the petitioner had not complied with the requirement of rule 32 by joining as respondents all the other candidates who were nominated; and his claim to be declared duly elected could not be proceeded with.

The first respondent had however, within the time limited, given notice under rule 40 of his intention to recriminate against the petitioner by proving that the petitioner had himself been guilty of the corrupt practice of bribery and personation and of hiring and using public conveyances.

As the right to recriminate is only exerciseable when the petitioner claims the seat for himself, these recriminations were withdrawn in so

far as the trial of the present petition is concerned, but the first respondent claimed the right to raise such recriminations in any future proceedings. •

The other respondents 2 to 5 also withdrew from the proceedings as their presence was no longer required.

In these circumstances the sole question to be tried is whether, within the meaning of rule 42 (1) (a), the election of the first respondent has been procured or induced or the result of the election has been materially affected by a corrupt practice. If so the election of the first respondent is, by the last provision in rule 42, to be void.

* * * * *

The Commissioners found that it was established that about 50 hired taxis were in fact used for promoting the election of the 1st respondent, and that the result of the election had thereby been materially affected.

Under rule 43 we report that the 1st respondent has not been duly elected.

The petitioner has not put forward a valid claim to be declared elected, and it is therefore not competent to us to report that he has been duly elected. • •

We record under rule 45 that no corrupt practice has been proved to have been committed by the 1st respondent or his agent or with the connivance of the 1st respondent or his agent.

Our recommendation as to costs is that the petitioner be liable in the first instance to Government for the cost of setting up this commission which has occupied $11\frac{1}{2}$ days and that this be retained out of the deposit made by him to Government, the balance being recovered from the petitioner. That the 1st respondent do pay the petitioner the cost of setting up the commission and the taxed costs of and incidental to this petition and to the trial of it. That the petitioner do pay the 1st respondent the taxed costs of and incidental to the filing of his written statement and of the costs incurred by the 1st respondent, if any, in connection with the list of further particulars of the charge of personation which was filed by the petitioner and in connection with recriminations put forward by the 1st respondent. That the petitioner do pay Mr. Davar Rs. 100 and Mr. Haji Rs. 150 as their fees respectively for attending the Commission for four days.

ANNEXURE A.

The petitioner seeks to file a list containing details of other instances in which he alleges that the first respondent's election agent connived at the commission of a number of acts of personation which are not mentioned in any of the lists attached to the original petition.

This is objected to by the first respondent, on whose behalf it is contended that such a list is not what is contemplated in rule 31 of the electoral rules (as originally numbered). Clause 1 of that rule provides that the petition shall contain a statement in concise form of the corrupt practices on which the petitioner relies. Clause 2 of that rule provides that the petition is to be accompanied by a list signed and verified setting forth full particulars of any corrupt practice which the petitioner alleges.

The petitioner in clause 3 of his petition did set out the charge on which he relies which is *inter alia* being guilty of corrupt practices within the meaning of schedule IV (as originally numbered) part I, clause 3, namely the procuring or abetting personation.

The original petition was accompanied by a list.

Now the petitioner wishes to file a further list and files a supplementary petition in support thereof. Paragraph 4 of that further petition also makes a charge that corrupt practices within the meaning (as Counsel for petitioner now states) of part I, clause 3, of the schedule were committed as per particulars thereto annexed. The particulars annexed repeat the charge of the same corrupt practice namely, personation with connivance and then sets out a list of particulars giving the names of the electors on the roll and the details whether he was dead, absent from Bombay, untraced or in Bombay without having voted. Rule 31 (clause 3) empowers the Commissioners to allow the particulars given in the original list to be amended.

In our opinion the addition of further instances of the same charge—personation with connivance—does not constitute the making of a further charge of corrupt practices, but only gives further instances of the commission of the same charge of the particular corrupt practice of personation with connivance. It is in fact an amendment of the particulars of the corrupt practice which was originally alleged.

The supplementary petition is admitted.

The application for leave to file the supplementary petition is made at a comparatively early stage and is supported by an affidavit which is uncontradicted.

Another preliminary question that has been argued is whether inspection should be permitted at this stage of the counterfoils of the voting papers under rule 1 in part 7 of the Bombay electoral regulations.

It is contended by the respondent 1 that so far as the particulars contained in schedule 1 of the original petition and in the list contained in the supplementary petition are concerned, no inspection is necessary for the petitioner's case, because he charges personation with connivance, and a positive charge of that nature can only mean and imply that a petitioner makes a definite case based on his knowledge or on evidence which is available.

So far as the five instances contained in schedule 2 of the original petition are concerned, they stand on a different footing because connivance is not therein charged. The absence of a charge of connivance may imply that the petitioner has not positive knowledge of personation, and it may follow that it would be unfair and unnecessary to prevent him from having inspection of the counterfoils relating to these five instances.

It may be stated at once that no question arises of interfering with the secrecy of the ballot, because the production of the mere counterfoils would not disclose how the elector voted.

Our ruling need only be confined to the question whether the petitioner should be permitted to have inspection of the particular counterfoils relating to his charges at this stage.

We hold that the petitioner is not entitled to have inspection of any counterfoils at the present stage relating to the charges of personation with connivance.

We also hold that the petitioner is entitled to inspect at the present stage the five counterfoils which relate to his charges without connivance and set out in schedule 2 to the petition.

The inspection of these five counterfoils will be taken by the petitioner and/or his legal adviser in the presence of a clerk of the Collector and of the secretary to this commission, and of the 1st respondent and/or his legal adviser.

ANNEXURE B.

It is contended for the 1st respondent that the entire petition should be dismissed on the ground that it is one and that its prayers are inseparable.

Rules 30, 31 and 32 make it very clear, in our opinion, that this is not the case.

Under rule 30, a petition may be presented against a returned candidate on the ground that corrupt practices have been committed by him or his election agent. No further charge or claim need be made.

Rule 32 confers a separate and distinct right on a petitioner which he may or may not avail himself of. It enables him, if he so desires, in addition to calling in question the election of the returned candidate, to claim a declaration that he himself or any other candidate has been duly elected.

This is a right which is in terms expressed to be in addition to the right of challenging this election, and we have no difficulty in holding that a claim of this nature in a petition is separable from a claim calling an election in question. This view receives support from the decision in *Aldridge vs. Hurst*, Law Reports 1 C.P.D. at page 415, where the Court states: "We see no reason why the prayer claiming the seat for some one might not form the subject of a separate petition from that which is directed against the return of the sitting member."

ANNEXURE C.

The petition which we are now trying has been presented against the 1st respondent who is one of two returned candidates, and is founded on allegations of the commission of the corrupt practices of personation and hiring public conveyances with connivance.

In addition to calling in question the election of the 1st respondent the petitioner, who was also a candidate, claims a declaration that he himself has been duly elected.

In the petition 5 persons are joined as respondents, all of whom were candidates nominated at the election, and in this form the petition has been presented and under rule 34 (as originally numbered) this commission has been appointed to try it.

As soon as possible after such appointment, a copy of the petition, so presented, was served on each of the 5 respondents named in it and was published in the gazette, as directed by rule 34 (2) (b) of the electoral rules.

The 1st respondent availed himself of the privilege conferred by rule 40(1) on a returned candidate, and within 14 days from the publication of the petition gave notice of his intention to give evidence to prove that the election of the petitioner would have been void if the petitioner had been the returned candidate and a petition had been presented complaining of his election.

The 1st respondent also filed a written statement from which it appears that 2 other persons were nominated as candidates at the election who have not been joined as respondents.

Rule 32 provides that if a petitioner claims a declaration that he himself has been duly elected he shall join as respondents to his petition all other candidates who were nominated at the election.

This duty is therefore imperative where the petitioner claims to have been duly elected, and it is apparent that the reason for imposing the duty is that each of the other candidates may have the opportunity to raise recriminations to show that the petitioner is not entitled to the declaration which he claims.

It was at first contended before us that the petition should be dismissed by us in its entirety, as a consequence of the failure of the petitioner to join all the candidates as respondents. But we have ruled that in our opinion the claim for the declaration that the petitioner has been duly elected is a relief separate and distinct from that by which the election of a returned candidate is called in question; and we have held that at any rate the petition is not bad in its entirety because in cases where the petitioner merely calls in question the election of a respondent it is not incumbent on the petitioner to join as respondents all the candidates who were nominated at the election.

The trial of the petition was therefore allowed to proceed at any rate in so far as it sought to call in question the election of the 1st respondent.

The petitioner now asks to be permitted to join as respondents the two other candidates who, as is now admitted, were nominated at the election, but who were not made respondents in the original petition. The application is opposed by the 1st respondent.

It is contended for the petitioner that the joinder of the two other candidates can be permitted and rule 33 is relied on which provides that subject to the other provisions of the rules an election petition shall be enquired into as nearly as may be in accordance with the procedure applicable under the Code of Civil Procedure. It is also contended that the rules permit of such joinder.

The main provisions in the rules to which the Civil Procedure Code must be read as being subject are those contained in rule 40, under which a right to recriminate is conferred. It is contended for the petitioner that the proviso to this rule which prohibits such recrimination unless the notice and deposit there referred to shall be given or made within the time limited is enacted for the protection of the petitioner and may be waived by him; and he offers to waive performance of these conditions precedent to recriminations being raised. He also relies on the fact that rule 32 imposes no limit of time during which all the other candidates should be joined.

Of the 2 candidates who were nominated at the election and who have not been joined as respondents one has now given a warrant to the petitioner's Counsel authorizing him to appear and state that he has no objection to being joined as a respondent and the other does not offer his consent to be joined though he was present while the application was being made.

The question whether it is competent to us at this stage to permit the 2 other respondents to be joined depends on the true construction of the several rules now to be considered.

The petition which we are now appointed under rule 34 (2) (a) to try is that which has been presented under rule 30 (1).

That petition must conform with rule 31 (1) and is to be accompanied by a list setting forth particulars of any corrupt practice which the petitioner alleges. The Commissioners have power to allow the particulars in this list to be amended, and this is the only power of amendment that is conferred by the rules in express terms.

Under rule 32 it is incumbent on the petitioner to join all other candidates who were nominated if he claims the declaration that he was duly elected, and under rule 34 the petition only has to be served on the respondents who have been joined.

The present petition therefore has not as yet been served on 2 proposed respondents. It has, however, been published in the gazette, and it may be that it was competent to them to apply under rule 34 (2) (b), to be joined as respondents, and the fact that a respondent so seeking to be joined is liable to give security as if he were a petitioner indicates that he is regarded as a party who will set up a substantive case, which can only be to prove that the petitioner ought not to be declared elected.

But where a candidate who has not been joined so insists upon being made a respondent, he must, under rule 34 (2) (b) do so within 14 days of the publication of the petition, and if he recriminates, he must, under the proviso to rule 40(1) give notice of his intention within the same limit of time, and supply a list of particulars similar to that which the petitioner is bound to supply. In effect he becomes a petitioner against the petitioner.

If such a candidate insists upon being made a respondent in the manner provided, the omission of the petitioner to join him in the first instance may possibly be cured. And in our opinion that is the only way in which a candidate who ought to have been joined and who has not been joined can become a respondent.

In the present case neither of the candidates who ought to have been joined and who were not joined has complied with the requirements of either rule 34 or rule 40, and even if they claimed to be joined now or were to be ordered by us now to be joined, the joinder could not be made in the manner provided by the rules referred to.

It must therefore be held that we have no power to order or permit the joinder of the two candidates who were nominated at the election but were not joined as respondents in the petition.

The result is that the petition, in so far as it claims a declaration that the petitioner was duly elected, does not comply with the requirements of rule 31, in that all the candidates who were nominated at the election have not been joined as respondents and it is not competent to the petitioner to claim the declaration.

The trial of the petition will proceed only in so far as it calls in question the election of the 1st respondent.

CASE No. XXIV

Bombay City North (N.-M.U.) 1924

(BOMBAY LEGISLATIVE COUNCIL.)

JOSEPH BAPTISTA *Petitioner,*

versus

(1) J. K. MEHTA	} <i>Respondents.</i>
(2) POONJABHAI THAKERSEY	..	..	..
(3) A. N. SURVE, AND TEN OTHERS	..	..	..

Residential qualification discussed.

Where the returned candidate's election is void the petitioner who claims the seat and received the next largest number of votes should be declared elected.

[The law on this subject has been altered by the Corrupt Practices Order, 1936. Under para 3 (2) of part III such claim must be supported by proof that the petitioner received a majority of the valid votes, or would have done so but for votes obtained for the returned candidate by corrupt practices].

ONLY two questions remain to be considered, and reported on, namely, (1) Whether the election of the first respondent is void for non-residence, and (2) Whether the petitioner is entitled to be returned for the reserved seat in place of the third respondent.

Rule 3 provides *inter alia* that the Legislative Council of the Governor of Bombay shall consist of 86 elected members, and these by rule 4 are to be elected by the constituencies specified in the schedule I. The name of the constituency in which the petitioner and the first respondent offered themselves for election is Bombay City (North); the extent of the constituency comprises the municipal wards B, E, F and G; the number of members is three and one seat is reserved.

The special qualifications which elected members must possess are prescribed by rule 6, which provides (*inter alia*) that no person shall be eligible unless his name is on the electoral roll of the constituency or of any other constituency in the province, and he has for the period of six months immediately preceding the last date for the nomination of candidates in the constituency resided in the constituency or in a division any part of which is included in the constituency, the city of Bombay being deemed to be a division.

It appears from the admission of facts made on behalf of and in the presence of the first respondent before us at the hearing of this petition that the first respondent maintains a house or residence at Santa Cruz which is situated some miles north of the northern boundary of the city of Bombay in the South Salsette Taluka; that he sleeps and takes his morning and evening meals there; and that the members of his family always remain there, sleep and take all their meals there. The first respondent is engaged as a secretary to and works in the offices of the Indian Chamber of Commerce which are situated in the city of Bombay, and he spends the usual working hours and takes refreshments during the day at those offices. It is not suggested that the first respondent maintains a second place where he sleeps and takes his meals or where the members of his family remain and sleep and take their meals (to use neutral terms) within the city of Bombay.

For the first respondent, two contentions are put forward: First, that by maintaining a residence at Santa Cruz he did reside within the constituency within the meaning of rule 6, provided that that rule be read with clause 2 of schedule II; and second, that even if his residence in Santa Cruz be held not to be residence within the constituency, his presence in the city of Bombay at the offices mentioned in itself constitutes a residence which is sufficient to comply with rule 6 read by itself.

Under rule 6 it is perfectly clear that no person is eligible for election as a member unless he resides in the manner therein prescribed. It is

equally clear, in our opinion, that the facts admitted constitute residence by first respondent at the date of nomination at Santa Cruz, which is not within the limits prescribed by rule 6. That rule deals with the qualifications of members and cannot be explained or added to by reference to clause 2 of schedule II which deals with the qualifications of electors. The last mentioned qualifications differ in material particulars from the qualifications of members.

Clause 2 of schedule II states alternatively that the place of residence of an elector for a city constituency may be within the limits of the North Salsette Mahal or the South Salsette Taluka. The rules nowhere contain a general definition clause to the effect that the term city of Bombay shall be deemed to mean and include North and South Salsette. The liberty to reside within North and South Salsette is a liberty specially conferred on electors, and it is not conferred on persons who wish to become elected members.

The result is that the legislature has, with some particularity, prescribed qualifications for elected members which are different from the qualifications which it has prescribed for electors, and it is impossible to read the provisions of the rules which prescribe the residential qualifications of electors into those which relate to the residential qualifications of elected members.

The rules have been drawn with perfect consistency. A person standing for election as a member for the Bombay City (North) constituency must reside in that constituency or in a division, any part of which is included in the constituency, the city of Bombay being deemed to be a division. If a person resides outside those limits and in a Bombay suburban district he is eligible for election under schedule I as a member for the constituency of thana and Bombay suburban districts.

With regard to the second contention, namely, that the presence of the first respondent in the city of Bombay during working hours as the secretary to and in the offices of the Indian Chamber of Commerce, constitutes residence within the meaning of rule 6, this was supported by reference to decisions under English statutes relating to bankruptcy, payment of taxes, etc. and in which the words used are in some cases residence or place of business. In any case we must follow the rule of construction that a statutory enactment should be construed with reference to its object, and there can be no doubt that the object of rule 6 is to ensure that elected members should reside in the ordinary and actual sense of the word among their constituents. A definition of the words "place of residence in a constituency" is contained in part II of schedule II of the rules for the Council of State, and though that definition is only expressed to be given for the purposes of that part, its wording may, in our opinion, be adopted as well expressing the nature of the residence

which the legislature intends that elected members should have, as prescribed by rule 6.

In our opinion the first respondent was not at the date of nomination eligible for election as he had no place of residence in the constituency of Bombay City (North) or in a division any part of which is included in the constituency within the meaning of rule 6.

It has been contended that the acceptance of the nomination by the returning officer is conclusive, as no objection was raised before him as to the first respondent's disqualification under rule 6, and as his name was on the electoral roll for the constituency for which he stood. We do not accept this contention.

In view of the facts which are now placed before us we are of opinion that the first respondent was disqualified for nomination, and we are of opinion that there was an improper acceptance of his nomination within the meaning of clause (c) of rule 42. It is also our opinion that the results of the election has been materially affected by the acceptance of that nomination and that the election of the first respondent is therefore void.

We also state it as our opinion that the returning officer discharged all the duties which are imposed on him by regulation 3 of part III of the Bombay regulations.

Having expressed our opinion that the election of the first respondent is void, it remains for us to report under rule 43, whether in our opinion, the petitioner has been duly elected. He seeks such a declaration in his petition, but it has been contended by some of the respondents that we should not report that the petitioner has been duly elected, in which case a casual vacancy would occur which would be filled under the procedure laid down in rule 24. The learned counsel who appeared under the instructions of the Advocate-General contended that rules 24 and 43 are complementary and should be read together, so that if a petitioner claims the seat in his petition and has received the next largest number of votes he should be declared duly elected, and that in such a case an election under rule 24 does not become necessary.

No recriminations have been made against the petitioner in accordance with rule 40, and he has secured the next largest number of votes after the first two candidates, and we therefore report under rule 43 that he has been duly elected.

In view of this report it is unnecessary to consider the question whether the petitioner was entitled to claim the reserved seat on the ground that he is a Mahratta Kunbi within the meaning of clause (f) of rule 2. But it does appear to us that the definition in clause (f) of that rule might be made clearer by inserting the word "Hindu" immediately before the word caste, so that it would read as follows: "Mahratta

means a person belonging to any of the following Hindu castes", if that is the intention of the electoral rules.

The petitioner has intimated that it may be taken that his petition is withdrawn on this point as against the third respondent in the event of the petitioner being declared elected.

On the question of costs we recommend under rule 43 (2) that the sum of Rs. 250 be paid to the Advocate-General's representative by the petitioner, that the costs of Government in setting up this tribunal (which has been occupied $3\frac{1}{2}$ days) be paid in the first instance by the petitioner and that the petitioner be entitled to recover two-thirds of such costs from the first respondent. The petitioner will pay the first respondent Rs. 100 as and for the costs of the first respondent's written statement.

CASE No. XXV

Bombay City South (N.-M.U.) 1930

(BOMBAY LEGISLATIVE COUNCIL.)

TRICUMDAS DWARKADAS OF BOMBAY .. *Petitioner,*

versus

SIR VASANTRAO A. DABHOLKAR AND DR. R. T.
NARIMAN *Respondents.*

The standard of proof necessary to establish a corrupt practice should be that required at a criminal trial.

Even if a candidate did not withdraw, the corrupt practice of bribery is established by an offer or promise to pay a gratification, with the intention of inducing withdrawal.

Certificate of indemnity granted under section 8 (1) (ii), part II of Act XXXIX of 1920.

PETITIONER is registered as an elector on the electoral roll of the Bombay City (South) non-Muhammadan urban constituency of the Bombay Legislative Council to which three seats are allotted. An election was held on 18th September, 1930 for electing members thereto, as four candidates, Dr. Alban J. D'Souza, Sir Vasant Rao A. Dabholkar, Dr. R. T. Nariman and Mr. Ramchandra M. Bhatt, had stood to contest the three seats. The last-named candidate withdrew from the candidature a few hours after the polling had commenced, and it is the petitioner's allegation that he was induced to withdraw his candidature by the offer or promise of the payment of Rs. 5,000 by Sir Vasant Rao Dabholkar and Dr. Nariman conjointly with one D. Cawasji and that, as a result thereof, Mr. Bhatt withdrew from the said election and the three remaining candidates were declared duly elected. The petitioner therefore alleges that the two candidates were guilty of corrupt practice at the election within the meaning of schedule V, part I, rule 1, of the Bombay electoral rules¹ and prays that for the reason the election of both of them should be declared void.

He has presented the petition only against two of the returned candidates, impleading Sir Vasant Rao A. Dabholkar as respondent 1 and Dr. R. T. Nariman as respondent 2.

In giving particulars of the corrupt practice, he relies upon a letter addressed and alleged to have been handed over to Mr. Bhatt, signed by the two respondents and Mr. D. Cawasji, which runs as follows :—

“ Town Hall,
Bombay, 18-9-30.

Dear Ramchandra,

We the undersigned promise to pay you Rs. 5,000 (five thousand) only if you withdraw immediately from this contest to avoid the trouble. This amount is placed at your disposal strictly for the purpose of charity as you may desire.

Yours sincerely,

(Sd.) V. A. DABHOLKAR,

(Sd.) R. T. NARIMAN,

(Sd.) D. CAWASJI.”

He further alleges that immediately thereafter Mr. Bhatt addressed and handed over to the Collector of Bombay a letter announcing his withdrawal from the election, and made a similar announcement to the intending electors then present at the Town Hall where the poll was being taken.

The respondents have put in their written statements. Respondent 1 in his lengthy statement denies that he induced Mr. Ramchandra Bhatt to withdraw from the election by offering the inducement alleged by

¹ Now section 1 of part I of the first schedule of the Corrupt Practices Order, 1936.

the petitioner or any inducement or that the latter withdrew in consequence of the offer alleged to have been made, as he had already decided to withdraw and communicated his decision to him and others sometime before the conversation regarding payment of Rs. 5,000 took place ; that the alleged action on his part does not amount to a corrupt practice, nor was the result affected by it ; that the letter does not accurately record the terms of the arrangement ; that shortly, the terms were as summarized in paragraph 9 of the statement, viz. that on seeing the Police arresting batch after batch of women-Desh Sevikas who had come forward to picket the voters and apprehending trouble from the crowds present there and feeling distressed about the matter, Mr. Ramchandra Bhatt decided at about 10-30 A.M. to withdraw from the election and communicated that decision to this respondent and to others ; that he then interviewed Mr. Healy, the Acting Commissioner of Police, and on being assured by him of the possibility of still more serious trouble, Mr. Bhatt decided to withdraw from the scene of the contest and go away from the Town Hall ; that shortly after he told respondent 1 and others that the blood of men which had been shed should be atoned for by payment of a sum to charity ; that this idea appealed to the respondent and eventually the letter was written out ; that there was great excitement round about and that the letter does not record the exact arrangement, which was, that Mr. Ramchandra M. Bhatt should immediately withdraw from the scene of the contest ; that it was not agreed upon that he was to withdraw from the contest, that the governing idea was to avoid all further bloodshed and expiate for the blood which had been shed ; that it was common knowledge that Mr. Bhatt could not have withdrawn from the contest at that stage, and that he knew it well ; that, lastly, he signed the letter without reading it in a state of great mental excitement.

Respondent 2 denies the fact of inducing Mr. Bhatt to withdraw as well as the fact that the latter withdrew as a result of any offer from him ; he denies being guilty of a corrupt practice. He alleges that respondent 1 sent for him and informed him in presence of Mr. Ramchandra Bhatt that he (Bhatt) had as a matter of fact retired ; that he was asked to sign the letter and he signed it without reading it, as he was then in a state of great excitement and suffered from the effect of heat stroke and was feeling giddy ; that Mr. Y. G. Pandit, Mr. Bhatt's agent, had already informed him before he signed the letter that Mr. Bhatt had actually withdrawn.

The most important documents in the case are the letter promising payment of Rs. 5,000 to Mr. Bhatt and the letter written by him to the Collector, as returning officer, announcing his withdrawal from the contest. These were produced from proper custody and was admitted and marked as exhibits A and B respectively.

In order to appreciate the points of law argued on behalf of both the respondents, it is necessary to state that the 4th of August, 1930 was the date fixed for nominations of candidates and 7th August, 1930 the date appointed for the scrutiny of nominations under rule 11(3) and (7). It is urged that a withdrawal of candidature to be an effective withdrawal should have taken place under rule 11(8) before 3 o'clock in the afternoon of the date succeeding that appointed by the Local Government for the scrutiny of the nominations. That date in this case would be 8th August and the hour 3 P.M. Mr. Bhatt not having withdrawn his candidature then, it was not open to him to withdraw it at all at any stage or on any day thereafter. His withdrawal, therefore, at 11-10 A.M. on 18th September was not an effective withdrawal; in fact, it is argued that under the rules, there is no provision for withdrawal after the stage in the elections mentioned in rule 11(8) and hence, even if it be found that Mr. Bhatt withdrew from the election as a result of the promise made in exhibit A, there would be no corrupt practice under the rules. Respondent's contention is that the withdrawal was ineffective at that stage, and that, inducing a candidate to resort to such an action by offer of a gratification would not come under rule 1, part I of schedule V. In support of this contention attention is drawn to the scheme laid down by the rules for holding elections which scheme is to the effect that where the number of candidates who are duly nominated and who have not withdrawn their candidature in the manner and within the time specified in sub-rule 8 of rule 11 exceeds that of the vacancies, a poll shall be taken—rule 14(1). It is argued that any withdrawal of candidature thereafter does not affect the necessity for taking a poll, and polling has to go on whatever the number of candidates, once the taking of poll has been decided upon; the result would be that even if all candidates but one withdrew long before or just after the taking of the poll has commenced, the polling has to go on till the last minute fixed for its closing. In dealing with this part of the case, we are of opinion that the definition of the words "Electoral right" does not support the respondents' contention. The words "Electoral right" mean the right of a person to stand or not to stand as, or to withdraw from being a candidate, or to vote or refrain from voting, at an election. Now in terms of this definition, if a person has a right to stand as a candidate, he has also a right to withdraw from being a candidate, unless that right has been taken away by the rules; and the rules nowhere take away that right. Rule 11(8), on which reliance is placed, is to be read along with rule 12(2). If a candidate by whom the deposit of Rs. 250 is made under rule 12(1) withdraws his candidature in the manner and within the time specified in sub-rule (8) of rule 11, his deposit is returned to him, otherwise not. This is not to be read to mean that any other manner of withdrawal or withdrawal at any other time is prohibited. This amount of Rs. 250 is taken as a deposit to provide for expenses of

polling in accordance with rule 14(1), where the number of candidates duly nominated exceeds the number of vacancies; and if a candidate withdraws after it has been decided to take a poll, he forfeits the deposit. But thereby his right to withdraw later, if he so desires, is not taken away.

It will be observed that no restriction whatsoever is placed on his right to withdraw. It is not provided that if it is exercised in the manner and within the time specified in sub-rule 8 of rule 11, then only would it be effective and not if exercised in any other manner and at any other time. If the legislature wanted to provide for shutting out withdrawals at a stage later than that specified in sub-rule (8) of rule 11, it would have specifically provided for that. This very word is used in schedule V, part I, rule 4 and it cannot be said that it is used in any restricted sense there. If these words be interpreted in the restricted sense contended for by the respondents it would lead to absurd results. If the object of the legislature was to preserve the purity of franchise and the purity of elections, then, reading the words in a restricted sense would defeat that object. Because it would be open to any candidate or any person to offer a bribe to a candidate at the time when the polling is actually in progress, to withdraw from the election, and thereby facilitate the election of the remaining candidates, as they would have to face one rival the less, and still it would not be a corrupt practice. Several English cases were cited in the course of the argument to show that interference with voters by way of bribery, etc. was a corrupt practice. There is no reason why the principle of those cases should not govern the case of interference with candidates. The purity of election has to be preserved right up to that end; it is not, therefore, conceivable that, if a bribe is offered to a candidate to withdraw in the midst of the polling, it would not be an offence, because, withdrawal, to be an effective withdrawal, could only take place in the manner and at the time specified in sub-rule (8) of rule 11. We may also point out that if the interpretation contended for by the respondents be accepted, the effect would be that the legislature will have made the offence of bribery under section 171(B) of the Indian Penal Code much wider than the corrupt practice under the rules. We, therefore, find that there is no substance in the contention that, withdrawal after the time specified in sub-rule (8), rule 11 being ineffective, no corrupt practice can be committed under the rules in respect of such a withdrawal.

Another question raised on behalf of the respondents was that the promise of payment to Mr. Bhatt was meant "strictly for charity" and therefore there would be no corrupt motive behind it. English cases bearing on the point in respect of charitable acts of candidates towards voters were cited, including *Wigan's* case (1881), 4 O'M. & H., 13, where the remark is made by Bowen, J., that "Charity at election times ought to be kept by politicians in the background". These

cases lay down that in each case the governing motive or intention of the act should be found ; if it be found to be pure charity and nothing else, the act would be innocent, otherwise not, and that the line of demarcation between a pure and a corrupt motive is very thin. It is a mixed question of law and fact, and from the evidence given at this trial we find that the object or motive with which the promise to pay Rs. 5,000 to Mr. Bhatt was made by the respondents was to induce him to withdraw from the contest and thus make their election secure ; he was the only rival and he had to be eliminated to make their position safe and their election a walk-over. That was the governing idea and not one to benefit any charity ; that the money was to go to charity " strictly " was a subsidiary motive and of secondary importance. The object in the first instance was not to benefit any charity, nor to expiate or atone for any sins of bloodshed—when in fact there was no bloodshed—but to get Mr. Bhatt out of the way under the cloak of a contribution to charity. The parties knew that a direct promise to pay money to a candidate who continued to be a candidate to make him withdraw was an offence. They therefore resorted to this device of clothing it as charity and thus escape the consequence of that act. As would be shown later, it is not as if the idea of promising the payment of Rs. 5,000 for purposes of charity struck the parties at 10-30 A.M. on the day of election (18th September), all of a sudden, as is tried to be made out by respondent 1. The idea was being nursed for several days before that, but did not result in anything tangible for various reasons. On the day of election, however, Mr. Bhatt felt that he had hardly any chance of success and that if he had to retire, he had better do so not empty handed but with the credit of having won something to be spent in charity. We are, on a review of the whole evidence on the point, unable to come to the conclusion that the governing motive of either the makers of the promise, i.e. the respondents, or of the acceptor thereof, i.e. Mr. Bhatt, was one of pure charity and nothing else. The consideration that moved Mr. Bhatt to accept the proposal was that by getting Rs. 5,000 to be spent in such charity as was to be indicated by him, he was earning religious merit.

It is argued that this inquiry is not in the nature of the civil inquiry, but a penal or at least a quasi-criminal inquiry, and that therefore the evidence should be considered as at a criminal trial, and if there is a doubt in the Commissioners' minds as to the proof of the charge against the respondents the benefit of the doubt should be given to them. We are aware that under rule 37 the procedure applicable to the inquiry is to be as nearly as may be, in accordance with that applicable to the trial of suits under the Code of Civil Procedure, 1908, but that the inquiry partakes also of the nature of one for the trial of an offence cannot be denied—See *Grant vs. Overseers of Pagham* (1877), 3 C.P.D.,

page 80. The standard of proof required to bring home the alleged corrupt practice to the respondents should be determined accordingly.

That Mr. Bhatt did retire after exhibit A was signed is also proved ; but, even if he had not and even if he could not have withdrawn from being a candidate, so far as the signatories are concerned, it is enough in our opinion if they have offered or promised the gratification of paying Rs. 5,000 to induce him to withdraw to bring their action within the purview of rule 1, part I, schedule V (see Rogers on Election, vol. II, page 269, edition 1928). On this point it is instructive to see what Coleridge J., says in a similar case—*Henslow vs. Fawcett*, 3 Ad. and Ellis, page 51 at page 58 : “ It is true that this is a statute highly penal, yet in construing penal statutes we must not by refining, defeat the obvious intention of the legislature. The question here is as to the meaning of the word ‘ corrupt ’. My brother Storks argues as if corrupting and procuring to vote or forbear to vote were the same thing. *Sulston vs. Norton* (3 Burr., 1235) distinctly shows that it is not so, and that a person may be guilty of corrupting who has not been guilty of procuring. It is not unimportant to look to other circumstances which are parcel as it were, of the statutable provision against bribery. Now it has been decided to be immaterial whether the party to whom the money is given or promised vote or not and even whether he have or have not a right to vote It appears to me that the offence of corruption is complete, whenever one party gives or promises money for the purpose of inducing the other to vote or forbear from voting, and that other professedly accepts for that purpose, the promise or money so made or given. Thus the offence is complete by the one giving with such intention and the other professedly accepting with such intention. He who gives under these circumstances and with this purpose appears to me to be corrupt and he who accepts, to be corrupted, within the meaning of this Act.” We accept the principle of this decision and applying it to the facts of this case, we find that the corrupt practice was complete when the respondents promised Mr. Bhatt Rs. 5,000 with the intention of inducing him to withdraw from the contest and he accepted it professedly with that intention, irrespective of the question whether under the rules he could or could not have withdrawn at that stage.

We have not till this moment mentioned the fact that respondent 2 is not a novice at the game of buying off rivals. He has admitted before us that at the prior election in March, 1930 he paid one of his rivals Rs. 750 and the other Rs. 1,000 to withdraw from the contest and they withdrew and he was elected. This expense was not, of course, shown in his return of election expenses and although he stated that he had spoken about the payment to Mr. Domingo, an officer connected with the election branch in the Collector’s office, no action seems to have been taken against him. This fact was brought out in his cross-examination ;

a question to that effect was put by petitioner's learned Counsel and objected to by respondent 2's learned Counsel. The Commissioners allowed it to be put having regard to section 146(3) of the Evidence Act. Respondent 2's learned attorney has asked us to grant a certificate of indemnity under section 8 (1) (ii), part II of Act XXXIX of 1920. We are of opinion that as he has answered truly all questions which in this respect he was bound to answer, such a certificate of indemnity in respect of that action which is likely to incriminate him and expose him to a penalty may be granted and we accordingly grant it. As it was prominently brought to our notice, we could not keep it back and had to embody it in our report.

This also is a proper place in the report to record the action of respondent 1. It seems one of his relatives who had been working for him had employed a man, one Ratanlal A. Mehta by name, for purposes of his election. He sent notices to respondent 1 to be paid the balance of his remuneration. Respondent 1 did not pay but sent on the notices to his relative, who according to him must have paid Ratanlal, and thereafter no further notices were sent to him. He has not paid that relative, but according to rule 19(2) (part K of form V) such expenses have to be shown in the return of election expenses. That he has not shown in his return is admitted and he gives two reasons for the omission: (1) that he did not know that any such expenses have to be shown in the return, and (2) that he got the notices long after he sent in the return of expenses. As the petition before us does not charge respondent 1 with any corrupt practice in that connection we merely record the fact in our report. We find therefore that the respondents have failed to make out the case set out in their written statements.

It was alternatively argued on behalf of the petitioner that if on the facts disclosed at the trial a corrupt practice under schedule V, part I, rule 1(a) cannot be found to be proved but one under rule 1(b) found to be proved, i.e. a promise of any gratification to a candidate as a reward for having withdrawn, then a finding should be given accordingly. A Privy Council ruling—L.R. 7 I.A., page 240—*Rajroop vs. Abul* was cited in support. Really speaking on the above findings no occasion for considering the question arises. But all the same we would point out that rule 33(2) requires full particulars of each corrupt practice and the date and place of commission thereof to be set out in the petition and if any amendment is desired on account of any omission, then it should be applied for under sub-rule (3) and unless that is done, it would not be proper to change one corrupt practice into another.

We have now to consider the cases of Mr. Bhatt and Dinsha Cawasji under rule 47 (a), (b) and record a finding whether a corrupt practice has been proved to have been committed by Mr. Bhatt who was a candidate and the nature of such corrupt practice, and whether Dinsha

Cawasji is proved at the inquiry to have been guilty of any corrupt practice and the nature of such practice, with any recommendation we may desire to make for the exemption of the latter from the disqualifications incurred by him under the rules. Both of them were given an opportunity to show cause why their names be not so recorded in the report. As for Mr. Dinsha Cawasji, it follows from the above findings that he has been guilty of the commission of the same corrupt practice as respondents 1 and 2 under schedule V, part II, rule 1, viz. making an offer or promise of a gratification to a candidate with the object of inducing him to withdraw from being a candidate at an election. He has furnished us with a written statement explaining his conduct, but we are not satisfied with it and record our finding as above.

As for Mr. Bhatt, he too has given a written explanation in which he says that some one from the crowd told him that he was making a sacrifice by withdrawing and so respondent 1 was also asked to make some sacrifice and that he had agreed to pay Rs. 5,000 to charity and then an arrangement was arrived at to write out a letter to that effect; that he did not withdraw because of the letter but because of what was happening outside the Town Hall; that as the suggestion for charity came accidentally, he thought a good purpose was going to be benefited and adopted it. The contents of the letter however, belie this piece of specious pleading. The letter distinctly says, if you immediately withdraw we the signatories will pay you Rs. 5,000. Broadly speaking, his case stands or falls with that of the respondents. If they promised him a gratification for inducing him to withdraw his candidature and if he accepted it and so withdrew, then he would be guilty under schedule V, part II, rule 3(b) of the rules. The learned Counsel who appeared for him divided his argument into two parts—one on a point of law and the other on facts. On the point of law he argued in common with the arguments of the learned Counsel for both respondents that once a candidate has failed to withdraw in the manner and within the time specified in sub-rule (8) of rule 11, it was not open to him to withdraw thereafter. The question has already been disposed of by us in the earlier part of our report.

It is further argued that Mr. Bhatt's action would merely amount to an attempt (an unauthorized attempt) to withdraw and that such an "attempt" was not made penal by schedule V, part II, rule 3, just as it is made an offence by section 511 of the Indian Penal Code. We have already said that we do not accept his contention about the withdrawal being invalid and therefore there is no need to deal with this part of his contention. But, if it were necessary, we would refer in this connection to the following observations (at page 57) of Patterson J., in *Henslow vs. Fawcett* cited before. "The corruption is complete without the vote being given", i.e. in this case the corruption is complete without

Mr. Bhatt withdrawing. Coleridge J.'s observations go further and are to the effect that if the acceptor of the offer does not possess the right to vote and still professes to accept it, as such, the corruption is complete, i.e. in this case even though Mr. Bhatt did not possess the right to withdraw, and that, as his learned Counsel says, he has the right to come back at 2-30 P.M. and claim a polling of the votes in his favour as a continuing candidate, the corruption was complete the moment he accepted the offer which he did (1) by delivering exhibit B to the Collector, and (2) by going away from the Town Hall. It is true that the rules do not make a specific provision for such a withdrawal, but on the other hand they do not prohibit a candidate from withdrawing at any time after the date of scrutiny if he desires so to do.

As to facts, it is argued on the evidence that there is really nothing against Mr. Bhatt. It is argued that Mr. Pandit, his own friend and helper, should not be believed, that respondent 1 when he says that Mr. Bhatt himself told Mr. Pandit to reduce the arrangement to writing should not be believed as he said so to save his own skin. Some capital is made out of the fact by his learned Counsel that in the press statement he published that very evening Mr. Bhatt says nothing about this arrangement and that therefore he could not have had any such intention as is now attributed to him. We think that he studiously avoided all reference to it in order to show to the public that he was moved merely by the sufferings of the people and by nothing else. Exhibit A cannot be a false record of the arrangement, if Mr. Bhatt asked Mr. Pandit to write it out. Then it is said that Mr. Bhatt being a rich man would not stoop to commit a corrupt practice for the sake of Rs. 5,000. But what if he thought that thereby he was benefiting some charity or other without his having to spend a single pie? In that respect his case is very similar to that cited by the learned Advocate-General's representative, Mr. Billimoria—*Imperator vs. Appaji*—I.L.R. 21 Bom., page 517. There, the Mahars of a certain village who had been suspended from their office attended a meeting held at the house of their Patel, at which the Patel was present and agreed to pay a sum of Rs. 300 towards the repair of the village temple (and not to the Patel), if they were restored to office, and it was held that the Patel had committed an offence under section 161 of the Indian Penal Code. The observations of Macleod, C.J., at pages 543-44 in the case of *Emperor vs. Amiruddin*, 24 Bom. Law Reporter, page 534, are also apposite and instructive. We may say that the intention or motive of the signatories in promising the amount to Mr. Bhatt was to get him out of the way and "to avoid trouble" as recited in exhibit A. Mr. Bhatt's intention or motive was to earn some money for a charity and thereby secure a sort of gratification for himself—a something which would please him—by becoming the instrument of benefiting a charity of his choice.

We report therefore that in our opinion the election of the respondents 1 and 2 has been induced by a corrupt practice and that the result of the election has been materially affected by a corrupt practice, viz. that respondents 1 and 2 induced Mr. Ramchandra M. Bhatt to withdraw from being a candidate by offering or promising to pay to him Rs. 5,000 to be paid to charity, and that their election is void—rule 14 (1) (a). We further record under rule 47(a) in our report a finding that a corrupt practice has been proved to have been committed by Mr. Ramchandra M. Bhatt and the nature of such practice is such as is set out in schedule V, part II, rule 3(a) to wit, that he being a candidate agree to receive a gratification as a motive to withdraw from being a candidate at the election; and also a further finding that Mr. Dinsha Cawasji has been proved at the inquiry to have been guilty of a corrupt practice and the nature of such corrupt practice is such as is set out in schedule V, part II, rule 1,—to wit, that he not being a candidate, committed the corrupt practice of promising a gratification to a candidate, viz. Mr. Ramchandra M. Bhatt, with the object of inducing him to withdraw from being a candidate and we do not recommend that he be exempted from the disqualification he has incurred in that connection under rule 5(3).

As for costs, our recommendation is that all costs of and incidental to the setting up of the commission be in the first instance recovered by Government from the petitioner and that the same be retained out of the amount deposited by him and the balance remaining thereafter be recovered from him personally. That the same, i.e. costs of and incidental to the setting up of the commission be paid by respondents 1 and 2 to the petitioner and that respondent 2, if he pays the whole amount to the petitioner, do recover four-fifths of the same from respondent 1. We further recommend that the petitioner do recover a sum of Rs. 4,000 for his costs from the respondents and that respondent 2, if he pays the whole amount to the petitioner, do recover four-fifths of the same from respondent 1; and we further recommend that the Advocate-General do recover Rs. 800 for his costs from the respondents and that if respondent 2 pays the above amount he do recover four-fifths of the same from respondent 1. Respondents 1 and 2 will bear their own costs.

CASE No. XXVI

Bombay Central Division (M.R.) 1935

(INDIAN LEGISLATIVE ASSEMBLY.)

HOOSEINBHOY ABDOOLABHOY LALLJEE .. *Petitioner,*

versus

AHMED EBRAHIM HAROON JAFFER	} <i>Respondents.</i>
A. M. QURAISHI ..	..
MAHOMED HASHAM MOLEDINA ..	..
KAZI ABDUL HAMID ..	..

The electoral roll as amended by orders of the revising authority is final and conclusive against an election inquiry tribunal. The errors in it must stand.

Law of agency discussed.

Criticism of political conduct must be distinguished from imputation against private conduct. There may be a statement of fact which is not an inference from the public acts of the person criticized.

APART from a dispute as to the age of the respondent no. 1, the grounds on which his election was impugned were two-fold. First, that he was not qualified as an elector for the constituency, because he was not assessed to income-tax in the financial year preceding that in which the publication of the electoral roll took place. It was contended that the electoral roll was conclusive, not only against the returning officer, but also against the election inquiry tribunal.

Secondly, petitioner alleged the commission of three corrupt practices : (1) publication of false statements, (2) one case of personation, and (3) the issue of circulars and a poster without the name of the publisher.

The following are extracts from a lengthy report :—

It is contended on behalf of respondent no. 1 that the electoral roll is conclusive not only against the returning officer but also on the election inquiry tribunal, and that it is not permissible for the latter to go into the question of the qualification based on clause (d) of rule 6 of part II of schedule II. Rule 7 refers to the disqualifications to which a person must not be subject in order to be entitled to have his name entered on the electoral roll. Rule 8 relates to qualifications including sub-rule (1) (iii) (c) and is to be read with clause (d) of rule 6 of part II of schedule II.

It appears that after the publication of the electoral roll in which the name of respondent no. 1 was entered at serial no. 15 Poona Cantonment, an application (exhibit 109) was made on 24th July, 1934 by Moledina respondent no. 3 to the Judge of the court of Small Causes, Poona, who was the revising authority under regulation 4(1) read with rule 9, sub-rule (2) (5). The revising authority rejected the application on the ground that the objection based on non-assessment to income-tax in the year 1933-34 was not made in the prescribed manner under regulation 3, sub-regulation (2) as it did not specify the evidence which the applicant intended to lead, and therefore the objection not being lodged in the prescribed manner should be rejected under regulation 3, sub-regulation (4). We cannot go into the question of the soundness of the grounds of the decision of the revising authority. Where a certain authority is clothed with power finally to decide a certain matter, it has unfettered jurisdiction to decide the matter, which is entirely independent of the manner of its exercise and involves the power to decide either way rightly or wrongly on the facts presented before it. See *Malkarjun vs. Narhari*, I.L.R. 25 Bom. 337 at page 347 P.C.

Under regulation 5, part II the Collector shall make an amended roll in accordance with the orders passed by the revising authority under the preceding regulation no. 4. Regulation 6 lays down that the electoral roll of any constituency as amended shall be conclusive evidence for the purpose of determining whether such a person is an elector in

such constituency. We are unable to accede to the contention on behalf of the petitioner that the electoral roll is conclusive only against the returning officer and not against the election inquiry tribunal. Rule 9, sub-rule (3) of the electoral rules lays down that the orders made by the revising authority shall be final, and the electoral roll shall be amended in accordance therewith and shall be republished. Sub-rule (6) lays down that any person may apply to such authority as may be appointed in this behalf by the Governor-General for the amendment of the electoral roll. The election inquiry tribunal is not such an authority. The electoral roll can be amended by an application to the revising authority under rule 9, sub-rule (3) or to the authority appointed by the Governor-General under sub-rule (6). Otherwise it is conclusive. When a statute creates a right not existing at common law and prescribes a particular remedy for its enforcement, then that remedy alone must be followed: per Willis, J., in *Wolverhampton Water Works Co. vs. Hawkes Ford* (1859), 6 C.B.N.S. 336; *Chunilal vs. Ahmedabad Municipality*, 13 Bom. L.R. 958 at page 960.

We think therefore that the rules and regulations contemplate that the electoral roll shall be conclusive not only on the returning officer but also on the election inquiry tribunal. Regulation 6 is quite clear and lays down that the electoral roll shall be conclusive evidence for the purpose of determining whether any person is an elector in such constituency. In *Stowe vs. Joliffe* (L.R. 9 C.P. 734) it was held that the register (electoral roll) is conclusive not only on the returning officer but also on every tribunal which has to inquire into elections, except only in the case of persons prohibited from voting any statute or by the common law of Parliament. See Halsbury's Laws of England, 1st ed., vol. XII, paragraph 886. The same view is accepted in the *Pembroke Borough's* case, 5 O'M. & H., 135. When it is said that a register is to be conclusive, what is meant is that the errors in it, if any, must stand. The same view is taken in Central Provinces Legislative Council, C.P. Commerce and Industry constituency in the petition of *Seth Mathradas vs. D. Laxmi Narain* (see page 288), where it was held, following the judgment in the *Pembroke Borough's* case, 5 O'M. & H., 135 at page 142 that the electoral roll is final and conclusive as to qualifications, and not as to disqualifications, i.e. it does not entitle any one to vote who is suffering under a statutory disability. This view is consistent with the opinion expressed in other election inquiry cases. See the *North Bhagalpur* case (see page 165), the *Purnea* case (see page 592), *Rawalpindi and Lahore Divisions* (see page 611), *Kistna* no. 1 (see page 454). The same view is adopted by Hammond in his book "The Indian Candidate and Returning Officer", pages 19 to 22, where it is observed "An elector is a person whose name rightly or wrongly is on the electoral register. He should possess certain qualifications. Even if he does not and his name is

on the register, his vote is good. The vote of certain persons, however, who definitely are disqualified by these rules, even if their names are on the electoral register, might not be refused by a presiding officer but would be rejected on scrutiny during the trial of an election petition." The other rules and regulations lead to the same inference. Part III, regulation 3 (1) (i and ii) shows that the returning officer may refuse nomination on the ground (1) that the candidate is ineligible for election under rule 5 or rule 6 (ii) that a proposer or seconder is disqualified from subscribing a nomination paper under sub-rule (4) of rule 11. So also the same regulation 3, sub-regulation (2) (a) lays down that the production of any certified copy of an entry made in the electoral roll of any constituency shall be conclusive evidence of the right of any elector named in the entry to stand for election or to subscribe a nomination paper, as the case may be, unless it is proved that the candidate is disqualified under rule 5 or rule 6 or, as the case may be, that the proposer or seconder is disqualified under sub-rule (4) of rule 11 (read with rule 7). It would thus appear that the question of disqualifications can be inquired into, but not of qualifications as to which the electoral roll of any constituency is declared to be conclusive for determining whether a person is an elector in such constituency. See regulation 6, part II. It is therefore permissible for the election inquiry tribunal to go into the question of disqualification of respondent no. 1, Ahmed under rule 5, sub-rule (1) (f), but not into the question of qualification under rule 8, sub-rule (1) (iii) (c) read with regulation 6(d) of part II of schedule II, as to which the electoral roll is conclusive.

It is contended, however, that under rule 42 and rule 44(c) if the result of the election has been materially affected by any non-compliance with the provisions of the Act and the rules and regulations thereunder the election of the returned candidate shall be void, and therefore if there is a non-compliance with the provisions of rule 8, sub-rule (1) (iii) (c) read with schedule II, part II, paragraph 6(d), the election tribunal has jurisdiction to declare the election void. But rule 42 and 44 do not override but are subject to the express provisions of rule 9(3) and regulation 6, part II, which clothe the electoral roll with the character of conclusiveness for determining whether any person is an elector, i.e. has the qualifications laid down by the rules and regulations for being an elector.

We think therefore that it is not necessary to go into the question whether respondent no. 1 has the qualification that he was assessed to income-tax in the year 1933-34 for the purpose of being enrolled on the electoral roll. If, however, it is necessary to express any opinion on this point, it is clear that respondent no. 1 was assessed to income-tax for the year 1933-34 and also paid it. The proviso to section 34, Indian Income-Tax Act, XI of 1922, clearly suggests that subsequent assessment

to income-tax relates back to the year 1933-34. The charge of income-tax is regulated by section 3 of the said Act. It is pertinent to observe that in that section the charge is referred to as "for the year" and not "in the year". If, however, it is necessary that the notice of assessment must have been issued in the year 1933-34, it must be held that respondent no. 1 was not assessed to income-tax in the year 1933-34. We would, however, suggest that the words "for" or "in respect of" should be substituted for the word "in" appearing before the words "the financial year" in clause (d) of paragraph 6 of part II of schedule II. Even though respondent no. 1 was assessed to income-tax for the year preceding the publication of the roll and actually paid it, the ambiguity of the expression "in the year" has given rise to the contention urged on behalf of the petitioner.

Our findings are that the electoral roll is conclusive as to the qualification of respondent no. 1 as an elector and therefore he was duly qualified as an elector.

The next questions arising for consideration are whether the election of respondent no. 1 has been procured or induced by any of the corrupt practices referred to in paragraph 10 of the petition as per particulars stated in lists I to III annexed to the petition, and whether the result of the election has been materially affected by any of the corrupt practices above referred to, and whether the election of respondent no. 1 is void. In paragraph 10 of the petition the petitioner has alleged that the respondent no. 1 has been guilty of every form of corrupt practice mentioned in the section, and in the lists he has given particulars of the said corrupt practices. Before us he has confined his evidence to three allegations of corrupt practices : (1) publication of false statements by dissemination of the leaflets, exhibit 161 printed at Samarth Press, Faizpur, exhibit 162 printed at Samarth Electric Press, Dhulia, and exhibit 163 printed at Loksevak Press, Bhusaval, which were reasonably calculated to prejudice the prospects of the petitioner's election, (2) personation by Abdul Gaffur Golandaj (exhibit 312), who was not entitled to vote at Malegaon on the ground that he was not an income-tax payer, of another person of the same name Abdul Gaffur Sait (exhibit 316) who was so entitled, (3) issuing of circulars (exhibits 230-A, 235-A and 251) and the poster (exhibit 237) without the name of respondent no. 1 as the publisher.

With regard to exhibit 161 printed at Faizpur it appears from the evidence of Kulkarni (exhibit 170) that Nur Mahomed gave an order for printing 4,000 copies at his press on the 7th of November and delivery was taken on behalf of Nur Mahomed on the 7th by Mahomed Hussein Budhan, who is the cousin of Nur Mahomed. The second lot of 2,000 copies was delivered on the 8th November to one Nurkhan Abbas whose signature appears to be as that of Munkhan. An order for 2,000 more copies was given which were delivered on the 10th to a person who has

not signed the delivery book. But payment in respect of these 6,000 copies was made by Nur Mahomed who had already given an order for printing an appeal in favour of respondent no. 1, exhibit 165, which consists of the printed matter of exhibit 172 and the signatures on exhibit 173. One of the signatories to this appeal is Nur Mahomed himself. He paid Rs. 20 in respect of the costs of printing of which Rs. 18 were credited for the first job of printing the appeal leaflet, exhibit 165 and Rs. 2 were credited to his account in respect of the second job of printing the Koran leaflet, exhibit 161.

Nur Mahomed in his evidence (exhibit 401) produced duplicates of the receipts (exhibits 404 and 405) and wanted the court to believe that he had paid in fact Rs. 20-12-0, of which Rs. 18 were paid in respect of exhibit 165 and Rs. 2-12-0 were paid in respect of the cost of printing his visiting cards and that nothing at all had been paid by him in respect of printing, exhibit 161. It would appear from exhibit 416 that the original account-books show that Rs. 20 and not Rs. 20-12-0 were paid by him on the 25th March, 1935. It appears clear that exhibit 405 is in respect of bill no. 436 for work done some months before, whereas exhibit 404 referred to bill no. 5 in respect of the work done on or about the 7th November.

It appears clearly that Nur Mahomed paid Rs. 20 in respect of the printing of exhibits 165 and 161 and not Rs. 20-12-0 as alleged by him in his evidence. It is also clear from the evidence that Nur Mahomed was working for Ahmed. It appears from the photograph (exhibit 346) that he attended to party given by respondent no. 1 to His Excellency Sir Fredrick Sykes and stood just near Ahmed's brother Ismail. He signed, exhibit 165, the appeal, in favour of respondent no. 1 which he got printed at the Samartha Press, Faizpur. He tried to explain his conduct in signing exhibit 165 by suggesting that he signed it in his capacity as the president of the Anjumane-Navjawanane-Islam because though he was working for Dr. Hamid he was overruled by the majority of the association and was compelled to sign it. The resolution of the association which he promised to produce is not forthcoming. His explanation therefore is in our opinion unreliable. Unless Nur Mahomed and respondent no. 1 were on the best of terms, it is not likely that Abdul Razak would depose that they both came together to him to get exhibit 163 printed at Bhusaval, even though Abdul Razak may have invented the story.

Nur Mahomed in his evidence could not deny that he gave an order for printing 6,000 copies of exhibit 174, the same as exhibit 161, because his signature appears on exhibit 174, but he falsely stated that he got it printed in the interest of Dr. Hamid.

"Agent" is defined in rule 30(a). "Agent" includes an election agent and any person who is held by Commissioners to have acted as an

agent in connection with an election with the knowledge or consent of the candidate." The law of agency in election has long been held in England to go much further than the ordinary law of principal and agent. A candidate is responsible generally for the actions of those who to his knowledge for the purpose of promoting an election canvass and do such other things as may tend to promote his election, provided that the candidate or his authorized agent has reasonable knowledge that these persons are so acting with that object. According to Halsbury's Laws of England, 2nd edition, vol. XII, paragraph 501, page 245, "A candidate's liability under the parliamentary common law of agency depends upon a peculiar principle special to this matter and distinct from the principles prevailing in criminal or civil law of agency. The candidate's liability under this principle may extend to the acts of every person who is *de facto* a member of the staff which is conducting the election and whose services are directly or indirectly recognized or made use of by the candidate or his election agent, whether such person be paid or unpaid." Reference may be made to the law of Parliamentary Elections and Election Petitions by Hugh Fraser, 3rd edition, page 73, where it is laid down: "That is putting it into a very simple form, but with regard to election law the matter goes a great deal further, because a number of persons are employed for the purpose of promoting an election who are not only not authorized to do corrupt acts, but who are expressly enjoined to abstain from doing them, nevertheless the law says that if a man chooses to allow a number of people to go about canvassing for him, to issue placards, to form a committee for his election, and to do things of that sort, he must, to use a colloquial expression, take the bad with the good. He cannot avail himself of these people's acts for the purpose of promoting his election, and then turn his back, or sit quietly by, and let them corrupt the constituency."

It appears clear from the other evidence in the case and the circumstantial evidence referred to above that the leaflet exhibit 161 was got printed by Nur Mahomed for or on behalf of Ahmed, respondent no. 1. Rule 4 of part I, schedule V, relates to the publication by a candidate or his agent of any statement of fact which is false and which he either believes to be false or does not believe to be true, in relation to the personal character or conduct of any candidate, which statement is reasonably calculated to prejudice the prospects of such candidate's election.

It is contended on behalf of respondent no. 1, that exhibit 161, does not come within the mischief aimed at by rule 4, part I of schedule V, as it is not a statement of fact in relation to the personal character or conduct of the petitioner and that it was not reasonably calculated to prejudice the prospects of the petitioner's election. The relevant portion of exhibit 161 runs as follows :—

“ Just consider and realize. From a perusal of ‘ Parchaye-Izhare-Haqiqat ’ (i e. paper disclosing the facts) it is clear that Husseinbhoy Lalljee does not believe in the Koran. When such a representative does not believe in the rules relating to the duties of (enjoined by) Islam, he goes against the Muslim opinion and acts against (the interests of) the Muslims. By going to the Assembly what service can he render to the Muslims ? Our request to the Bohra brethren is that (since) you too are believers in the Koran and (since) you ought to support a person who is a neighbour and a believer in the Koran, the ‘ Hadis ’ (the traditions) and the ‘ fiqhah ’ (theology) and who can safeguard the rights of the Muslims.”

It is contended on behalf of respondent no. 1 that this is a statement of opinion and not a statement of fact. Further it is urged that it is not an imputation against the veracity or the honour of the petitioner and therefore it is not in relation to the personal character or conduct of the petitioner. It has been made clear to us by Mr. Abhyankar on behalf of respondent no. 1 that he does not contend that the statement that Husseinbhoy Lalljee does not believe in the Koran is not false.

The leaflet “ Parchaye-Izhare-Haqiqat ”, exhibit 164, deals with the public acts of Husseinbhoy and is a criticism against his political conduct as distinguished from private conduct. Such a criticism is permissible in an electioneering campaign, but it does not contain any reference to the non-belief of Husseinbhoy Lalljee in the Koran. The statement in the first paragraph of exhibit 161 is doubly false. In the “ Parchaye-Izhare-Haqiqat ” there is no reference to Husseinbhoy's non-belief in the Koran, and the statement that Husseinbhoy does not believe in the Koran is not alleged by respondent no. 1 to be true. There is clear evidence on the record that the statement is false. In our opinion it is a statement relating to the personal character and conduct of the candidate. The authorities relied on behalf of respondent no. 1 in *West Coast and Nilgiri* case (see page 713) and *Ahmednagar District* case (see page 34), do not in our opinion apply to the facts of the present case, for the impugned statement in exhibit 161 is not a matter of opinion but is a statement of fact. The decision of the election tribunal in the *Tirhut Division* case (1935), (see page 680), does not apply to the facts of the present case. In that case reference in the leaflets was made to the public acts of Moulvi Abdul Hamid Khan and an inference was drawn from those acts that he was “ a disgrace to Islam ” and “ a rebel against Islam ”, and therefore it was held that the false statements in that case were not in relation to the personal character of the candidate.

In the present case it is asserted in the leaflet (exhibit 161) that Husseinbhoy does not believe in the Koran. It is a statement of fact

and not an inference from the public acts of the petitioner. The only basis on which reliance is placed in exhibit 161 is the *Izhare Haqiqat* from which no such inference can arise. The statement that a candidate in a Muhammadan constituency does not believe in the Koran contains the innuendo that though the candidate does not believe in the Koran and is not a Muhammadan, he is prepared to stand as a candidate and impose upon the Muhammadan members of the constituency. Such a statement in our opinion is a statement of fact in relation to the personal character and conduct of the candidate. The subsequent sentences in exhibit 161 set out above lend support to this finding.

It is obvious that in a Muhammadan constituency a false statement of fact that a candidate does not believe in the Koran is reasonably calculated to prejudice the prospects of such candidate's election. The remarks of Baron Pallock in *Sunderland's* case 1896, 5 O.M. & H., 62 are apposite to the facts of the present case and run as follows :—

“Any false statement, whether charging dishonesty or merely bringing a man into contempt, if it affects, or is calculated to affect, the election, comes within this Act. I would give two illustrations that have occurred to my mind as showing the meaning of this. Some perfectly innocent acts may be done by people, and yet they may come, if they are stated to be done in this way, within the Act. Supposing any gentleman in a county constituency was to say of his adversary that he had shot a fox, and he said it for the purpose of working upon the minds of the constituency during an election, that would certainly come within the meaning of the Act. Again, if any person in a constituency where one of the members was a temperance man, were to say that he had seen him drinking a glass of sherry—a perfectly innocent act—that would also bring him within the Act.”

The evidence on record clearly shows that the leaflet, exhibit 161, did as a matter of fact prejudice the prospects of the candidate's election. We are not concerned with the effects of the leaflet, but we have to consider whether the leaflet, exhibit 161, was reasonably calculated to prejudice the prospects of such candidate's election, and we have no doubt that the leaflet, exhibit 161, comes within rule 4, part I of schedule V.

It is however contended on behalf of respondent no. 1 that Husseinbhoy issued many pamphlets in order to counteract the effect of the leaflet, exhibit 161. But even if it be held that he succeeded in counteracting the effect of the leaflet, exhibit 161, we are concerned under rule 4 with the intention of the publication of the leaflet and not with its result. And we have no doubt on the evidence and the circumstances disclosed in the case that the leaflet (exhibit 161) which was printed at Faizpur by Nur Mahomed for and on behalf of Ahmed respondent no. 1 offends against rule 4, part I in schedule V.

The next question is whether there is sufficient evidence in the case to connect Ahmed, respondent no. 1 with the publication of this leaflet (exhibit 161). This fact is sought to be proved by the petitioner by producing the evidence of several persons from the different centres who depose that the workers of Ahmed respondent no. 1 were seen distributing the leaflets, and some of the witnesses depose that they received packets containing the leaflet, exhibit 161, printed at Faizpur from Ahmed, respondent no. 1 which were posted from Poona on the 10th and 11th of November.

We have therefore come to the conclusion that Ahmed respondent no. 1 is not only responsible for the printing of exhibit 161 at the Samartha Press, Faizpur through Nur Mahomed but also that it was published by him by disseminating it by post in packets to the voters in the Central Division. We have already held that the dissemination of exhibit 161 amounted to a publication of a statement of fact which was false, relating to the personal character and conduct of the petitioner, which statement was reasonably calculated to prejudice the prospects of the petitioner's election.

The second allegation of corrupt practice is in relation to the personation by Abdul Gaffur Golandaj (exhibit 312) who it is alleged was not entitled to vote at Malegaon as he was not an income-tax payer, and still he had applied for a voting paper in the name of Abdul Gafur Sait (exhibit 316) who was really entitled to vote as he was an income-tax payer. Abdul Razak (exhibit 313) for the petitioner stated that Abdul Gaffur Golandaj (exhibit 312) came to the polling station accompanied by Abdul Razak, the agent of Ahmed Sait, that Mahbubkhan the agent of Dr. Hamid objected to the voting of Abdul Gaffur Golandaj (exhibit 312), and that the real voter Abdul Gafur Sait came subsequently and his vote was recorded as a tendered vote. He is corroborated on this point by Abdul Gafur Sait (exhibit 316). It appears that Abdul Gafur Sait paid the income-tax in Margashirsha in the Samvat year 1990 and the income-tax was assessed on five persons who were partners of the family business. The partners of the family partnership named by him and who were assessed to income-tax were Abdul Haji Hamid Khudabax, himself, Mahomed Hamid Abdul Hamid, Mahomed Yasin Abdul Hamid and Abdul Khaliq Abdul Hamid. It appears from the electoral roll of the Malegaon municipality (exhibit 315) that all the five persons are on the electoral roll. It therefore follows that Abdul Gaffur Golandaj (exhibit 312) who had ceased to pay the income-tax some years ago was not entitled to vote at the election and that Abdul Gafur Sait (exhibit 316) was entitled to vote. It may therefore be said at first sight that when Abdul Gaffur Golandaj (exhibit 312) applied for a voting paper in the identical name but really in the name of Abdul Gafur Sait (exhibit 316) who was entitled to vote on the ground that he had paid income-tax, a corrupt practice of personation did really

take place. But Abdul Gaffur Golandaj (exhibit 312) was a voter at the previous election in the Central Division six years ago as he had paid assessment at that time, and the new electoral roll may have been considered by him to have been framed on the basis of the old electoral roll. There is reason to believe that Abdul Gaffur Golandaj might have been under the impression that he was entitled to vote in the election that took place in November, 1934, for, though he had ceased to pay the income-tax the name of Abdul Gaffur was on the electoral roll. Having regard to these circumstances we think that we should give the benefit of the doubt on this question to Abdul Gaffur Golandaj (exhibit 312) as there is a possibility of a *bonâ fide* mistake on his part. We are not prepared to hold that the corrupt practice of personation was resorted to in the present case. The second allegation of corrupt practice made by the petitioner must therefore in our opinion be held not proved.

The third allegation of corrupt practice alleged by the petitioner relates to the issuing of circulars (exhibits 230-A, 235-A, 251) and the poster (exhibit 237) without the name of respondent no. 1 as the publisher. These exhibits are proved to have been got printed by Ahmed respondent no. 1 at the Chitrashala Press, Poona through Bhaldar, and they do not bear on their face the name and address of the publisher thereof. We, however, think that though the absence of the name of publisher comes technically within rule 8, part II of schedule V, the matter is a trivial one and we are satisfied that the election of the returned candidate has not been procured or induced and the result of the election has not been materially affected by this corrupt practice within the meaning of clause (a) of rule 44. Nor has the result of the election been materially affected by non-compliance of the provisions of rule 8, part II, schedule V within the meaning of rule 44, sub-clause (1), clause (c). Further in our opinion the corrupt practice referred to was trivial, unimportant and limited in character within the meaning of clause (c) of sub-rule 2 of rule 44.

Our finding is that the election of respondent no. 1 has been procured or induced by the corrupt practice falling within rule 4 of part I of schedule V, viz. publication by respondent no. 1 and his agents, by dissemination of leaflets similar to exhibit 161 printed at the Samartha Press, Faizpur, of a statement of fact which was false and which he believed to be false, in relation to the personal character and conduct of the petitioner, which statement was reasonably calculated to prejudice the prospects of the petitioner's election. Our finding is that the result of the election has been materially affected by the said corrupt practice referred to above and that the election of respondent no. 1 is void.

The petitioner in his petition made a prayer for a declaration that he having secured the second highest number of votes was duly elected. We do not think, however, that he is entitled to such a declaration. Although our findings have resulted in rendering the election of respon-

dent no. 1 void, it is difficult to say with certainty whether the petitioner or the third respondent Moledina or any other candidate would have been elected if Ahmed, respondent no. 1 had not been in the field. The votes given to respondent no. 1 cannot be considered to have been merely thrown away. As a result a fresh election would be necessary.

The result therefore is that in our opinion the election of Ahmed respondent no. 1 is void under rule 44. As regards costs the petitioner has succeeded only in part. He has failed on several of the issues and even on the issue as to publication of false statements on which he has succeeded, he has failed as to the publication of the leaflets printed at Bhusaval and Dhulia. On the other hand much of the oral evidence was concerned with the point on which the petitioner has succeeded. Therefore we propose to allow the petitioner half his costs as follows.

The petitioner should in the first instance pay to Government all the costs of and incidental to the setting up of the tribunal, which amount to Rs. 8,230 and recover from respondent no. 1 one-half of the said costs, viz. Rs. 4,115 only. We think that the pleader's fees in this case should be allowed at Rs. 100 per day and assess the total pleader's fees of the petitioner at Rs. 2,400. The petitioner should recover Rs. 1,200 out of this amount from respondent no. 1 as pleader's fees. The petitioner should also recover from the said respondent Rs. 903 being half the costs incurred by him in payment of Bhatta to witnesses, process fee, translation fee, etc. No order as to costs for or against the other respondents.

CASE No. XXVII

Bulandshahr District (East) 1921

(UNITED PROVINCES LEGISLATIVE COUNCIL.)

CHAUDHRI AMAR SINGH *Petitioner,*

versus

PANDIT NANAK CHAND *Respondent.*

Need for definite charges in particulars emphasized. The "concise statement of material facts" cannot be dispensed with.

An irregularity or non-compliance with the rules does not of itself avoid an election. It must be shown that the result of the election was materially affected.

THE date of the election was 30th of November, 1920. There were six candidates. The result was the election of Pandit Nanak Chand who received 4,324 votes. Next to him came Chaudhri Amar Singh, R.B., who received 4,081 votes. No other candidate received so many as 1,200 votes. Amar Singh filed his petition on the 11th December, 1920.

On the application of the respondent, we struck out paragraphs 3, 4 and 5 of the petition. Paragraph 3 is "That at Malikpore and several other polling stations, regulations 17, clause (3), and 19 were not complied with and such non-compliance materially affected the result of the said election". This paragraph contained no statement of material facts such as is required by rule 31. Paragraph 4 is "That at Sarai Chabila recording of votes was stopped for about half an hour in the middle on account of which many voters could not record their votes for want of time". This paragraph is somewhat vague, but we would have been prepared to enquire into it. It was, however, withdrawn by petitioner's counsel. Paragraph 5 is "That at several places persons applied for a voting paper under false personifications and were wrongly identified". This paragraph like paragraph 3 contains no statement of material facts.

We are of opinion that it would be a dangerous precedent to encourage any laxity with regard to rule 31. It was said in *Worcester* (1892), quoted in Hammond's *Indian Electioneering*, page 154,¹ that "To deliver particulars which contain nothing but the name of the candidate and the character of the offence suggested and leave everything else in blank and to attempt under them to fish out some possible materials from which the blank may be filled up is an abuse of procedure". It is true that the word "particulars" is restricted in rule 31 to "corrupt practices", and the facts alleged in paragraphs 3 and 4 are mere irregularities. But we are not prepared to dispense with the concise statement of material facts required by rule 31, and we cannot accept paragraph 3 as containing any statement of facts whatever. Paragraph 5 alleges personation, which is a corrupt practice, and it gives no particular whatever. After striking out paragraphs 3, 4 and 5 we also struck out the words "and corrupt practice" from paragraph 6 because no allegation of any corrupt practices remained in the petition.

We then proceeded to enquire into paragraph 2, which was all that remained of the petition. Paragraph 2 is "That at the Malikpore polling station a quarrel ensued between the presiding officer and some of the voters which prevented the recording of votes from about 2 P.M. and the election had to be stopped altogether at 3-15 P.M. or about it, on account of which hundreds of voters had to go away without giving their votes,

¹ First edition.

most of whom would have voted for the humble petitioner". The written statement of the respondent contained an admission that the election had to be stopped altogether at 3-15 P.M. We framed the following two issues :—

1. Whether at the Malikpore polling station a quarrel ensued between the presiding officer and some of the voters which prevented the recording of votes from about 2 P.M. ?
2. Whether this fact, if proved, together with the admitted fact that the election had to be stopped altogether at 3-15 P.M. materially affected the result of the election ?

The written statement also contained counter-allegations against the petitioner, but all these have disappeared. Those contained in paragraph 11 of the written statement we struck out because it was not relevant, as the petitioner had not claimed that he himself should be elected, but only that the election of Pandit Nanak Chand should be declared void. There remained allegations on both sides that the opposite party was responsible for the stopping of the voting at Malikpore. These allegations, however, have all been withdrawn, and we do not propose to say anything about them in our report, beyond stating that we are convinced that neither candidate was guilty of any improper behaviour in the matter.

It was necessary for us to decide two points : (1) Was there a non-compliance with regulations as contemplated in rule 41 (1) (c) ? (2) Was the result of the election materially affected by this non-compliance ? We are of opinion that there was a non-compliance, but that the result of the election was not materially affected thereby.

We pass now to the facts, and here we depend mainly on Mr. Eastwood's report, exhibit 2. Mr. Eastwood was the chief polling officer at Malikpore. He had three colleagues. The four polling officers were provided with four tables, which stood in the Malikpore village school. They were all in the same room. Polling proceeded simultaneously for the United Provinces Legislative Council and for the Indian Legislative Assembly. Each polling officer dealt with both elections. The system was that the electoral roll was divided into four portions according to patwaris' circles. A certain number of these circles was allotted to each polling officer. The voters were admitted at the gate of the school compound, where a police guard was stationed. Four pathways led from the gate to the four polling officers and the voters were admitted in batches of ten for each pathway. They left the compound by another exit. The hours of polling fixed by Government were 8 A.M. to 4 P.M. But no votes, or very few, were recorded before 9 A.M. and polling was slack till about 11 A.M. Polling was then brisk and by 12 o'clock the crowd outside the gate was getting uncontrollable. The reason for this

was that it was a market day at Malikpore and the polling station, rather unfortunately, was situated on the edge of the market, so the crowd outside the Malikpore polling station was greater than at other polling stations. Between 12 and 2 Mr. Eastwood had repeatedly to go in person to the gate of the compound in order to regulate the admission of voters. This, however, caused no interruption to the voting. His three colleagues were sitting at their tables issuing voting papers, and he himself was always able when he came back to his table to deal with all the voters who had accumulated in the absence. He says "I was always able to work off the waiting list before going out again, except the last time". At half past two the crowd got out of hand and burst through the gate of the school compound. Apparently they did not enter the school itself in large numbers for a time, but ultimately they did so, and to quote Mr. Eastwood's report "By 3 o'clock the position became impossible as the crowds of voters simply swamped the room and the presiding officers and clerks could do nothing. Every effort was made to clear the room, but in vain. At 3-15 P.M. I was compelled to stop the election proceedings".

These are the facts. It is quite clear, and it is not denied by the respondent, that the regulation prescribing the hours of voting was not complied with. Voting ought to have gone on till 4 o'clock. It was definitely stopped at 3-15. It is pretty clear that no voting at all took place after 3, and probably very little after half past two. For the purposes of our calculation we have accepted the figure "2-30" as the time when voting ceased to be possible. The figure was accepted by the petitioner. The respondent would prefer to call the time "3 o'clock", but we regard the report which was written at 3-45 P.M. on the same day and was signed by all four polling officers as the best evidence on this point.

We have now to form an opinion whether the result of the election was materially affected by this non-compliance with the rules. It was argued for the petitioner that he had only to show that it is possible that the result might have been affected. We are unable to accept this position. Section 42 directs us to report that the election is void if in our opinion the result of the election was materially affected. It does not say that we are to declare the election void because the result of the election might conceivably have been affected. In forming our opinion we have made use of two methods of calculation. In the first of these we have restricted ourselves to what took place at the Malikpore polling station. The total number of the electoral roll of Malikpore is 2,387. The total number of votes recorded is 877. There were thus 1,510 voters who did not vote. But it is quite certain that in no circumstances would the whole of these voters have succeeded in recording their votes. We have it from Mr. Eastwood that the voters did not commence to arrive

till 9 A.M. and that the voting was not brisk before 11 A.M. We have given full weight to this evidence by reckoning the whole period from 8 to 11 A.M. as equivalent to only one hour of brisk voting. We have then $3\frac{1}{2}$ hours from 11 A.M. to 2-30 P.M. during which voting went on as fast as the polling officers could deal with it. We reckoned this as $3\frac{1}{2}$ hours of brisk voting. Adding one hour for the period from 8 to 11 A.M. we obtained $4\frac{1}{2}$ hours of brisk voting. During that time 877 votes were recorded. If the polling station had remained open for another hour and a half, one-third of this number of additional votes would have been recorded, that is 292 voters would have been able to record their votes. From this calculation it is clear that, even if the whole 1,510 voters had been present, the polling officers would have been quite unable to record so many votes. Now Nanak Chand's majority was 243, so if the whole 292 voters had voted for Amar Singh, the result of the election would have been affected. But we are of opinion that it is not possible that he could have succeeded in polling all the remaining votes, and that no other candidate would have polled any. Of the 877 votes actually polled 341 were cast for Amar Singh and 277 for Nanak Chand. There is no evidence to show that this proportion would not have been maintained after 2-30 P.M. If it had been maintained the petitioner Amar Singh would have obtained 113 votes out of 292. The respondent Nanak Chand would have obtained 92. The difference between them would only amount to 12 votes, which would not have wiped out the majority of 243. Of course these calculations are merely approximate, but the margin of error is not large.

Our second calculation proceeds on a consideration of the other polling places of the constituency. Polling took place at 21 polling stations. We have taken the total electoral roll of the whole constituency, excluding only Malikpore. The result is 20,392. In the same way we have taken the total number who recorded their votes, excluding Malikpore. The result is 9,828. We have reckoned how many persons would have voted at Malikpore if the voting had taken place there on the average of the rest of the constituency. The result is 1,144. The number who actually voted is 877. The number who were prevented from recording their votes would be 267. This figure is smaller than the first figure, which is 292, but the result is practically the same. The majority would have been reduced by about 21 votes. The agreement of these two calculations confirms us in our opinion. We believe that we can also explain the small difference between them. It appears from the report which the Collector submitted to the reforms officer of the provinces that actual polling took place almost exclusively between the hours of 10 and 3 and that very few votes indeed were recorded after 3-30 at the latest. The figure of 292, therefore, which assumed that brisk polling continued up to 4 P.M. is probably too high.

These two calculations are the main grounds of our opinion and we propose to say very little about the rest of the evidence. We examined witnesses on both sides, but they said nothing which disturbs our conclusion. Some of their evidence we have accepted, other parts are obviously biased. It is in evidence that a number of identification slips were issued in respect of which no votes were recorded. When a voter went in to the polling room he stated his name and he was then supplied with an identification slip. When this had been duly filled in he presented it to the polling officer and received in exchange a voting paper. When the voting was interrupted, there were naturally a certain number of voters who held in their hands identification slips; 59 of these have been produced by Sohan Lal, who was the representative at this polling station of the respondent Nanak Chand. A smaller number were thrown on the table and were sent up to headquarters by the polling officer. This is additional evidence, if any were wanted, that there were voters who were prevented from voting by the disturbance and the closing of the poll; but that point is not in issue. It is also evident that a large proportion of these voters were Nanak Chand's supporters, for otherwise 59 identification slips would not have found their way to the hands of Nanak Chand's man. This evidence, therefore, confirms our opinion. We are, therefore, in a position to say with great confidence that the result of the election was not materially affected by what took place at Malikpore.

We recommend that the petitioner pay respondent's costs, which we have fixed at Rs. 950.

CASE No. XXVIII

Bulandshahr District West (N.-M.R.) 1924

(UNITED PROVINCES LEGISLATIVE COUNCIL.)

THAKUR MANAK SINGH *Petitioner,*

versus

(1) LALA BABU LAL }
(2) LALA PIARE LAL } *Respondents.*

Admission of an election petition by the Governor cannot be questioned by an election inquiry tribunal.

A false statement which did not reflect on the personal character and conduct of petitioner is not a corrupt practice.

A PRELIMINARY objection was taken that the election petition was time-barred. The Commissioners did not consider that they were competent to inquire into this point after the petition had been accepted by the Governor.

A charge was made that with the connivance of respondent no. 1 or his agent, Nawab Ahmad Sayid Khan of Chhatari exerted undue influence on his tenant voters, but no evidence was produced to that effect. Nor were the Commissioners prepared to accept as reliable, evidence adduced to prove that respondent no. 1 offered gratification mentioned in the petition to certain persons to induce them to exercise their influence on their behalf in this election. A further charge that respondent no. 1 secured or attempted to secure the withdrawal of respondent no. 2 from the candidature by payment or offer of Rs. 1,400 raised an important point. It appeared that the Nawab of Chhatari who supported Lala Babu Lal feared that if Lala Piare Lal, who belonged to the same community, was to stand, the prospects of Lala Babu Lal would be prejudiced, and that owing to a split in the votes, the return of Thakur Manak Singh, the swarajist candidate, might result. Under these circumstances, negotiations in regard to the withdrawal of Lala Piare Lal took place between the Nawab of Chhatari and his relative the Rais of Daupur, the employer of Saligram, father of Lala Piare Lal, respondent no. 2. For the petitioner, three letters (exhibits 6, 7 and 8) were produced, which were admitted or not denied by the respondents. Exhibit 6 was a letter from Saligram to his son, Piare Lal, in which he referred to a letter from the Nawab of Chhatari to the Rais of Daupur, in which the Nawab stated that the amount of expenses alleged to have been incurred by Piare Lal seemed to be excessive and that he would settle the matter. Saligram thereupon asked his son to suspend all canvassing and all work in connection with his candidature. Exhibit 7 was a copy of a letter from the Rais of Daupur in reply to one from the Nawab of Chhatari. The copy was made by Lala Saligram. The letter was dated the 4th December, 1923. After discussing the amount of expenses claimed by Lala Piare Lal it stated that if Rs. 1,900, the amount claimed, were reduced by Rs. 500, Lala Piare Lal would not be a loser. It appeared that this letter was a copy of the letter referred to in exhibit 6 as an enclosure to that letter. Exhibit 7 contained this sentence, "main apne khat men pahle hi yeh likh chuka hun ke agar apke khyal men kharcha ka milna koi zaruri nahin hai, to Lala Saligram is nuqsan ke bardasht karne ke liye taiyar hain". For the petitioner it was urged that the last word of this sentence should read "nahin" and not "hain". Exhibit 8 purported to be a note from Hardayal Singh to his nephew Lala Piare Lal saying that a definite reply would be sent on the return of the Rao Sahib of Daupur from Chhatari. This letter was

not dated. Other letters were also produced which the petitioner challenged as being fabricated so as to show the letter (exhibits 6, 7 and 8) in harmless light. The Nawab of Chhatari was not examined nor the writer of the other letters. It was argued that the six letters exhibited disclosed that the offer to pay the election expenses of Lala Piare Lal was made and accepted and that therefore the bargain was complete. The Commissioners did not accept this view. "In exhibit 7 it was distinctly stated that, if necessary, Saligram is ready to bear the election expenses incurred by his son and in another letter (exhibit 11) the Nawab of Chhatari clearly accepts that suggestion."

On the oral evidence produced as to statements made by Piare Lal and Lala Babu Lal, the Commissioners were not inclined to place much faith.

They report, "It is true that Saligram must be regarded as, through his employer, somewhat under the influence of the Nawab of Chhatari who supported Lala Babu Lal. But the facts as disclosed by the evidence seem to us to be that though the withdrawal of Lala Piare Lal may have been first mooted by Lala Babu Lal or his supporters, yet the question as to payment of his election expenses seems to have been first raised by Saligram. Discussion as to the amount of those expenses did certainly take place in correspondence between Saligram's employer and the Nawab of Chhatari, but we cannot find that any offer or promise of gratification was made by Babu Lal or his agent or by any other person with his connivance in order to induce Piare Lal to withdraw from his candidature.

"We therefore decide this issue against the petitioner."

In this connection it was urged that the wording of the last sentence of the explanation to section 1, part I, schedule V of the electoral rules permits the payment by a candidate of the election expenses of another candidate provided that they are shown in the return of election expenses and that therefore a payment by Lala Babu Lal, even if proved, would not be illegal.

"We admit that the wording of the explanation in question is not free from ambiguity, but we do not think that it could have been the intention of the legislature that one candidate should procure the withdrawal of another by payment of his election expenses. We suggest that this ambiguity should be removed by amendment of the rule."

The last charge was that respondent no. 1 published or caused to be published false statements of facts in relation to the personal character or conduct of the petitioner.

Lala Babu Lal, respondent no. 1 on or about the 25th November, 1923 issued a handbill in which it was stated that "the canal rates are now nearly double what they formerly were. Even in this Thakur Manak Singh voted for enhancement of the rent which resulted in a very great burden on the tenants".

This statement as it stands in the handbill was held to be certainly false. It was proved that on the three occasions when the question of enhancement of irrigation rates came up before the Legislative Council, Thakur Manak Singh took no part in the debate or in the voting. The evidence showed that some 800 or 1,000 copies of the handbill were copied and distributed. Oral evidence was given to prove that owing to the distribution of this handbill several voters who had previously intended to vote for Thakur Manak Singh changed their minds and voted for his rival. The Commissioners considered that the evidence of these witnesses was not reliable. They report :—

“It seems to us doubtful how far the publication of statements in printed handbills is likely to influence opinion in an agricultural and rural constituency at the present time. Undoubtedly the question of irrigation rates is one that vitally affects both zamindar and tenant voters in the constituency. It is in evidence that Thakur Manak Singh, who stood for the swaraj party, was supported by the local organization of that party and that no opportunity was lost to demonstrate that the statement contained in Lala Babu Lal's handbill (exhibit 1) were incorrect. We are unable to accept the view of Thakur Manak Singh and his witnesses that the contradictions both published in print and made orally by his agents were too late to counteract the alleged effect. These rates had been in force since 1st April, 1923, and it is a reasonable assumption that the voter in Thakur Manak Singh's constituency knew the attitude towards them of their candidate too well to be influenced by any electioneering pamphlets. Hence we hold that the statement complained of is not proved to have prejudiced the prospects of Thakur Manak Singh's election. We further hold that the statement complained of was not in relation to the petitioner's personal character and conduct but rather to his character and conduct in his public capacity as a member of the Legislative Council. We have been referred to the *Ballia* election petition (see page 113), but the circumstances of that case were not similar to those of the present case. In that case the statements were such as seriously to affect the personal character of the petitioner. In the present case we do not think the statements were such as to affect the personal character and conduct of Thakur Manak Singh.

“We agree with the view of the Madras Election Commissioners in dealing with the *West Coast and Nilgiris* (see page 712), that ‘the statement that a person voted’ (or did not vote) ‘in a particular way is an assertion of historical fact, a mere setting forth of a political act in a person's political career. What result that act may have had on the interests of constituents . . . is not a question of fact but of opinion and, therefore, will not come within the mischief of the rule’.

“We hold that in the present case the statement did not cast any reflection on the personal character and conduct of the petitioner. As

to the question whether Lala Babu Lal either believed the statement to be false or did not believe it to be true, we think, as we have said above, that Lala Babu Lal was culpably negligent in failing to verify the truth of the statements before he published them. Verification was necessary even if, as he alleges, he obtained the information from the Nawab of Chhatari. A person may take away a false impression as the result of a conversation and, no matter what his source of information, it is incumbent on a candidate for a public office to verify all statements with regard to the actions of a third person before publishing them.

“To sum up we find that the petitioner has failed to prove any of the allegations made in the petition. We would therefore advise His Excellency the Governor that the petition should be dismissed.

“In view of the circumstances of the case we recommend that each of the parties should bear his own costs.”

CASE No. XXIX

Bulandshahr District West (N.-M.R.) •1931

(UNITED PROVINCES LEGISLATIVE COUNCIL.)

THAKUR UDAYA VIB SINGH *Petitioner,*

versus

MR. ARJUNA *Respondent.*

Publication of defamatory statement relating to character of petitioner in his public capacity not a corrupt practice.

Desirability of bringing any objectionable practice to notice of presiding officer emphasized, as for example intimidation of voters. Evidence regarding latter discussed at length.

Return of election expenses examined. As the return was not signed by the agent both the candidate and election agent incur disqualification.

SEVERAL of the charges alleged by the petitioner against the respondent were not pressed at the hearing. Those regarding which evidence was led related, first, to an application filed by the defendant on the 23rd of September of withdrawal and the cancellation of the appointment of the respondent's election agent, Khubi Ram.

A second charge was that a leaflet (marked A) described the petitioner as "self-seeking" and an enemy of the country, and as having made a speech in Council recommending that highly paid posts should be reserved for Europeans and not given to Indians. There was also a second leaflet (marked B) to which petitioner took objection.

Thirdly, undue influence was alleged, certain voters being, it was stated, threatened with social ex-communication at Ghatal, a polling station, while general intimidation was practised elsewhere.

Lastly the petitioner contended that the respondent did not file a true return of his election expenses, and that the return was invalid inasmuch as the person who signed it, Khubi Ram, was not, when he signed it, the respondent's election agent.

On these points extracts from the Commissioners' report are as follows :—

"On the 23rd of September, the respondent admittedly filed before the returning officer, the Collector of Bulandshahr, an application, exhibit 3. This application set out that the respondent's name should be struck off the list of candidates, and that Khubi Ram his election agent should be removed from the post of election agent. In so far as this purported to be an application of withdrawal by the respondent it had no legal effect, for the time within which the respondent could have withdrawn had passed. In so far as it purported to be an application for the revocation of the appointment of an election agent it was irregular, inasmuch as another election agent was not forthwith appointed and declared. On the 26th of September, the respondent made to the returning officer an application, exhibit 4, purporting to withdraw the application, exhibit 3. This application sets out that if the respondent's election agent's authority be deemed to have been withdrawn by the application of the 23rd of September, the respondent hereby reappoints the same man as his election agent.

"We are of opinion that Khubi Ram was undoubtedly the respondent's election agent up to the 23rd of September, and that in view of the application, exhibit 4, he was the respondent's election agent from the 26th of September, onwards. He may not have been the respondent's election agent between the 23rd and the 26th, and in that event there was a breach of the rule which requires a fresh election agent to be appointed immediately following the revocation of the appointment of an election agent. But a breach of that rule does not necessarily invalidate an election. Whether

it does or does not invalidate an election depends on whether the result of the election was materially affected by the breach of the rule. It can hardly be suggested that the result of the election was in the slightest degree affected by the breach of the rule. All that the petitioner has suggested is that he was misled by the application of the 23rd of September, into suspending his activities and that it was not until the 26th of September that he learnt that in spite of the application of the 23rd there would be a poll and the poll actually took place the next day, the 27th of September. As to this we are in the first place not satisfied that the petitioner did suspend his activities in spite of his assertion to that effect given as a witness. The petitioner is not only a lawyer by profession but is also a politician of some experience, who has already sat in the Legislative Council and who at the last general election was a candidate for more than one constituency and was also a candidate for the Legislative Assembly. We find it difficult to believe that a person of that character would suspend all activity on the eve of an election in consequence of such an application as exhibit 3 made by his opponent. Moreover, the petitioner has admitted in evidence that he was told by the Collector of Bulandshahr on the 23rd of September, that he was going to send a telegram to Government enquiring whether in view of the application, exhibit 3 a poll should take place or not. That is to say, the petitioner, even if he was not aware of this before the Collector spoke to him, must have become aware from what the Collector said that there was a reasonable possibility of a poll being held. Moreover, the petitioner has merely suggested that his suspension of activity might have affected the result and has scarcely attempted to prove that it in fact did so. It is the respondent's case on this issue that the application of the 23rd of September, was obtained by the petitioner's fraud and by the exercise on the respondent of undue influence by the petitioner. The details are set out in the respondent's written statement and in his evidence. There is no corroborative evidence to support the respondent's assertions and we are not prepared to accept controverted facts as proved on the uncorroborated assertion of the respondent. We must, however, note that the petitioner himself accompanied the respondent to the Collector's bungalow on the 23rd of September, when the respondent presented to the Collector the application, exhibit 3, and that the other persons present on that occasion, a note of whose names was made by the Collector on exhibit 5, were all obviously friends of the petitioner. They included Brahmajit Singh, vakil who admittedly drew up the application, a person who had been appointed by the petitioner to represent him at the scrutiny of nominations at Meerut where the petitioner was standing as a candidate. They included Munshi Lal, mukhtar of Meerut, a person from whose brother or nephew the petitioner borrowed a large sum of money about this time. They included Thakur Manbir Singh, mukhtar, a person who

admittedly worked for the petitioner in this election. The other three persons present were Budhipal Singh and Banni Singh, who are admitted by the petitioner to be uncle and nephew, and Ghulam Mustafa. There is definite evidence that Banni Singh is related by marriage to the petitioner. This was certainly not put to the petitioner in cross-examination nor to other relatives of his who appeared as his witnesses. But learned Counsel for the respondent explained that that was because instructions on the point reached him after the petitioner's case was closed. The assertion was certainly made by a witness called for the respondent and the petitioner was challenged to deny the assertion by an affidavit and did not accept the challenge. As for Ghulam Mustafa, he is admittedly a *karinda* of the Chatari estate and it is admitted that the petitioner obtained a larger proportion of his votes at Chatari polling station. He obtained about 200 votes on his own admission at Chatari and he obtained only 330 votes in the whole district. There is definite evidence on the respondent's side that the *karindas* of the Chatari estate canvassed on the petitioner's side.

"We are therefore satisfied that all the persons who accompanied the respondent to the Collector's bungalow on the 23rd of September were friends of the petitioner and neither the petitioner nor any of his witnesses has been able to suggest the slightest connection between any of these people and the respondent. Of these people the petitioner himself, Pandit Brahmajit Singh, *vakil* who drew up the application, and Ghulam Mustafa, are the petitioner's witnesses, and their case is that the respondent accompanied by two unknown men, who disappeared before the Collector's bungalow was reached, came to Brahmajit Singh and asked him to draw up the application which he did. The petitioner was then informed by an acquaintance that the respondent was making his application before the Collector at his bungalow, and therefore he went to the Collector's bungalow to verify the information given him and there he chanced to find assembled the other persons whose names were noted by the Collector, all of whom had come to see the Collector for one reason or another. As against this we have the evidence of Munshi Lal, *mukhtar* of Meerut, one of the persons undoubtedly present, who says that the application was written, not as the *vakil*, Pandit Brahmajit Singh would have it at Brahmajit Singh's house, but at the house of the petitioner himself and was moreover dictated by the petitioner. Beyond the fact that his brother has some connection with the Dalit Udhar Sabha, an organization supporting the respondent's candidature, there appears to be no reason to suspect the truth of what Munshi Lal says, and the story given by the petitioner himself, Brahmajit Singh and Ghulam Mustafa, does not appeal to us.

"On this issue therefore our conclusion of fact is that the petitioner must have had more connection with the respondent's application of

the 23rd of September than he will admit, but that little reliance can be placed on the assertions of the respondent setting out in detail how this application came to be presented. That is to say, neither fraud nor undue influence are definitely proved. As to the legal effect of the application, that has already been set out in discussing this issue. The failure to appoint forthwith an election agent in the place of Khubi Ram was an irregularity, but one that had no effect on the result of the election and that therefore cannot justify the setting aside of the respondent's election."

The next issue concerned the leaflet described in the petition as leaflet A, a copy of which is exhibited as exhibit 9. "This leaflet purports to be issued by the secretary of a body describing itself as the Congress election boycott committee. There is no doubt that, if not the Congress officially, at all events a large number of Congress men, supported the respondent's candidature. Admittedly this leaflet was widely distributed in the constituency for sometime before the polling day. There are three points in the leaflet to which the petition takes objection. He is described in it as self-seeking (*khudgharz*): as an enemy of the country (*desh drohi*): and it is said that he made a speech in Council recommending that highly paid posts should be reserved for Europeans and not given to Indians. As to the expressions '*khudgharz*' and '*desh drohi*,' these in the first place would appear to constitute mere abuse as distinct from defamation, and in the second place it is clear from the context of exhibit 9 that they refer to the conduct of the petitioner as a public man, that is to say to his conduct in submitting to nomination as a candidate at the election, and not to anything in the private life of the petitioner. The leaflet begins by setting out that in the circumstances in which the country stands only self-seeking people could agree to accept nomination to the Council and goes on to describe the petitioner as a self-seeking person and an enemy of the country. It is clear that what is meant is that all persons who accept nomination must be self-seeking and enemies of the country and that therefore the petitioner who accepts nomination must be such. We need not comment on the merits of such a contention. It is enough to say that the attack on the petitioner is clearly an attack on him in his public capacity. He is attacked because in spite of the recommendation of the Congress to the contrary he insists on standing for election to the Council. There is no suggestion that he has ever in any other respect conducted himself in such a manner as to justify the epithets '*khudgharz*' and '*desh drohi*'.

"As to the reference to a speech alleged to have been made by the petitioner when he was a member of the Council in March, 1930, the facts set out in the leaflet are certainly untrue and no attempt has been made to argue otherwise. An official report of the speech has been produced and it is obvious that the petitioner never said that high posts

should be reserved for Europeans or anything like it. But here again the attack is obviously an attack on the public conduct of the petitioner.

"The petitioner suggests that distribution of the leaflet exhibit 9 constituted a corrupt practice under the definition given in schedule 5, part I, paragraph 4. But the paragraph 4 confines itself to statements made in relation to the personal character and conduct of any candidate. The statements complained of, whether reasonable or unreasonable and whether true or false, were statements made in relation to the public not to the personal character or conduct of the petitioner; and their publication did not therefore amount to a corrupt practice within the meaning of the rules. This being our opinion it is unnecessary to discuss the issue further. It is enough to say that this leaflet was admittedly distributed for some days before the election by persons supporting the respondent's candidature.

"Paper B is exhibited as exhibit 12. No attempt is made by the respondent to justify it. The respondent's case practically amounts to this, that the leaflet was not in existence before the 27th of September, which was the polling day, and that it had been printed by the petitioner himself in order to support his election petition.

"The case on this issue really resolves itself into this, that there are a number of witnesses called by the petitioner, including the petitioner himself, who say that they saw copies of this leaflet affixed in various villages during the week or 10 days immediately preceding the polling day; while there are a number of witnesses called by the respondent, including the respondent himself, who say that they never saw this leaflet at all until they were shown it at Moradabad. We consider it enough to say that we find it almost impossible to believe that it was issued as the petitioner alleges. It is a most extraordinary document and begins by setting out that certain Congress people have nominated the respondent as a candidate for the Council against his wish. This is curiously reminiscent of the opening of exhibit 3, the respondent's application to the returning officer dated the 23rd of September, a document which there is at least reason to suspect was drawn up by the petitioner himself; and it is a most amazing way in which to open a leaflet which on the petitioner's case was intended as propaganda in favour of the respondent who was, as has been set out above, strongly supported by a number of Congress men, if not officially by the Congress itself. The leaflet goes on to say that the respondent's brothers (whoever they may be) should vote for him, and that those who do not vote for him will be cursed by God and charged for their conduct on the day of judgment; and it concludes by setting out that if the respondent is elected he will give a feast to all his brothers. Regarded as propaganda, and improper propaganda, this is on the face of it most ineffective, and could hardly have been supposed anything but ineffective by any type of intelligence.

The vague suggestion that the respondent, if elected, will give a feast to all his brothers, without any suggestion who his brothers are, could hardly be expected to influence the voting. And the reference to the deity and the day of judgment is not backed by any authority which could lead voters to suppose that failure to vote for the respondent would indeed incur the divine wrath. On the other hand as a piece of evidence for the petitioner the leaflet is obviously handy. It briefly sets out an offer of a bribe and the invocation of divine displeasure, these both amounting to corrupt practices within the rules, and it also sets out that the respondent is a mere dummy put up by the Congress, a point on which the petitioner has always laid great stress.

"It therefore appears to us from a study of the document itself almost impossible to suppose that it was issued either by Arjun or by any other person genuinely acting on his behalf. There is no definite evidence that it was issued by the petitioner before or after the 27th of September. But we find it difficult on a study of the document itself to resist to suspicion that this was so. There is another consideration in this connection. The petitioner states in his evidence that during the election campaign he saw no less than 50-60 copies of this notice in various places and he sets out that he first saw a copy of this notice at the very least a week before the polling day. He also sets out that he was quite aware when he read the notice that it was not only objectionable in a general sense but was also against the law. He sets out that he complained to certain influential Congress men who told him that it was ordinary election tactics. The petitioner is a barrister, an experienced lawyer and an experienced politician. According to his own admission he saw copy after copy of this notice which he knew to be illegal affixed in village after village some days before the polling day, and yet he would have us believe that he did not make any complaint to any official. We find it very difficult indeed to believe that that was so. We very much fear that the reason that the petitioner made no complaint was the sufficient reason that this leaflet was not in fact in existence.

"Our finding on this issue is that the petitioner has failed to prove his case.

"We propose to discuss separately the evidence of what happened at each polling station. In this way we will discuss and appraise the reliability of most of the witnesses for the petitioner who allege general intimidation and interference. We begin with the polling station, *Ghatal*. Here the petitioner set out in argument that his witnesses were P.W. 11, Pirthi Singh, and P.W. 18, Gulab Singh. But in point of fact Pirthi Singh does not suggest that he ever got anywhere near *Ghatal*. He certainly says that he was threatened by a number of Congress workers acting for the respondent. But he says that this was in his own village *Arnia*. P.W. 18, Gulab Singh, certainly does say

that he got as far as Ghatal, that is to say, as far as the polling station, and that he was there accosted by a number of Congress workers working for the respondent. These numbered about 100. They threatened him and therefore he turned back and went home.

"Now the polling station at Ghatal was a canal bungalow and we find it very difficult to understand how it could have been effectively picketed as the witness, Gulab Singh, alleges without the matter being brought to the notice of the presiding officer. It is to be noted in this connection that the petitioner's polling agent at Ghatal was a mukhtar, Manbir Singh. This Manbir Singh, mukhtar, who is not to be confused with another man of the same name who is the petitioner's brother, was one of the people noted by the Collector as accompanying the petitioner and the respondent to his bungalow on the 23rd of September. He was one of the petitioner's workers at this election and he was summoned as a witness by the petitioner but not produced. It is very difficult to understand how a man of this character could fail to point out to the presiding officer the flagrant interference with the rights of the voters that was taking place outside the polling station and obviously within view of the polling station. We find it impossible to place any reliance on the statements made by the petitioner's witness, Gulab Singh, and we would note that the assertions this man makes are contradicted by five witnesses called for the respondent. This man also speaks of a meeting at Baragaon.

"We now proceed to *Khurja*. Here the petitioner's witnesses are P.W. 4, Peare Lal, P.W. 12, Sardar Singh, P.W. 16, Tikan Singh, P.W. 21, Talewar Singh and P.W. 23, Mahabir Singh. P.W. 4, Pearey Lal, says that a number of people including himself were threatened with social boycott and with the divine displeasure by Arjun's workers and by Arjun himself, these being stationed in numbers in front of the polling station. Here again we are greatly impressed by the objection that no complaint whatsoever was made to the presiding officer who in this case was the Magistrate in charge of the *Khurja* sub-division, a senior Deputy Collector. It is especially peculiar that no complaint should have been made by this particular witness, for the witness admits that he voted, that is to say, he went inside the polling booth, and he is a man of some status being both a member of the municipal board of *Khurja* and the secretary of the Bulandshahr District, Aman Sabha. It does not appear, however, that he made the slightest attempt to draw the attention of the presiding officer to what was going on practically just outside the polling booth. Moreover this witness says that he had seen exhibit 12 circulated in *Khurja* and we have already set out that we strongly suspect that no such notice was ever circulated. We would also note that though this witness says that he himself was one of the persons threatened at the *Khurja* polling station, his name does not appear in the list of those

threatened required of the petitioner by the respondent and filed by the petitioner on the 23rd of February, the day on which we began to hear evidence. Our conclusion is that this witness is not worthy of credit. In addition to speaking of what happened on the polling day he speaks of a meeting held in the Ganga Mandir some days previously.

“P.W. 12, Sardar Singh, is also a member of the municipal board and a mukhtar by profession and he was actually one of the petitioner's polling agents at Khurja. But he again like P.W. 4, Pearey Lal, made no complaint to the presiding officer. He says not merely that voters were threatened by persons working for Arjun outside the polling booth, but that they were actually physically prevented from going inside the booth. He names one person so prevented, Lt. Multan Singh. We find it almost impossible to believe that such flagrant interference with the rights of the voters could have been witnessed by this witness without any complaint being made to the Sub-Divisional Magistrate who was acting as the presiding officer. We note also that this witness speaks of the distribution of exhibit 12. He also speaks of meetings held earlier at Bahanpur and Deorala. We cannot accept this witness as reliable.

“P.W. 18, Tikam Singh also states that he was stopped from voting and he puts the number of persons stopping voters outside the polling booth at 500-700. He was asked if he was aware that there were orders under section 144, Cr. P.C. in force at Khurja that day. It is unquestionable that such orders were in force and the witness must have known it. But he says that he was not aware of it. We do not find it possible to place any reliance on this witness. He speaks of a meeting held at Bahanpur previously at which threats were uttered.

“P.W. 21, Talewar Singh also speaks of being forcibly stopped from voting. We do not find it possible to believe this witness. We note that he speaks of the distribution of exhibit 12.

“P.W. 23, Mahabir Singh is a B.A., LL.B., and he was one of the petitioner's polling agents at Khurja. He professes to be unaware that orders under section 144, Cr. P.C. were in force. He puts the number of Congress men outside the polling station interfering with the rights of the voters at 1,000. But even so, he did not draw the presiding officer's attention to what was happening. He speaks of the distribution of exhibit 12. We do not find it possible to believe this witness.

“We now take the case of *Pahasu*. Here the petitioner's witnesses are P.W. 17, Hargayan Singh and P.W. 22, Behari Lal. The petitioner in his argument also quoted P.W. 20, Karan Singh. But Karan Singh does not speak of what happened at *Pahasu*.

“P.W. 17, Hargayan Singh not only alleges that he was himself forcibly prevented from voting but also says that there were no less than 200 men with him who were also prevented from voting, threatened

and turned back. If that statement is an approach to the truth, it would seem to follow that the persons acting for Arjun and interfering with free election at Pahasu were very numerous indeed. It is in evidence that the *tahsildar* was the presiding officer here and it is further in evidence that the petitioner himself was here for several hours. The evidence led for the respondent is to the effect that the petitioner was at Pahasu from 9 A.M. to 1 P.M. and the petitioner himself admits that he only went to two polling stations that day, Chatari and Pahasu, and that he was not more than 15 minutes at Chatari. From this it follows that he must have been at Pahasu for a considerable time. We find, however, no complaint either by the petitioner or apparently by any body else made to the presiding officer. In fact the petitioner, in his evidence, himself said nothing whatever about what happened at Pahasu. As for P.W. 17, Hargayan Singh he speaks of the distribution of exhibit 12 which we do not believe existed before of the 27th of September and we find it impossible to accept him as a witness to truth.

"We now proceed to Jahangirpur. There was a definite issue in connection with Jahangirpur polling station, covering the petitioner's assertion that his workers had been forcibly removed, but there was nothing about this in evidence and only one witness was called to speak of events at Jahangirpur and he was P.W. 16, Rati Ram. He says that he came to the polling station in a cart and when he got within 20 paces of the polling station his cart was turned back and he himself was made to retire by persons working for Arjun. He is by no means an impressive witness. He says that no police arrangements were made which cannot be credited. He speaks of the distribution of the highly suspicious leaflet, exhibit 12 ; and he apparently takes a considerable interest in the result of this petition, for he continued to attend the court several days after his evidence had concluded.

"We now proceed to Jewar. Here the petitioner's witnesses are P.W. 5, Avinash Chandra and P.W. 10, Subedar Gulab Singh. Avinash Chandra says that voters were forcibly prevented from getting into the polling station by a crowd numbering about 100. This man is by profession a mukhtar. He was acting as the polling agent for the petitioner at Jewar and it is very difficult to believe his assertions in view of the petitioner's failure to suggest that any complaint was made to the presiding officer and in view of the petitioner's failure to produce the presiding officer. Subedar Gulab Singh is somewhat more moderate putting the number at 150-200. We regret to have to find that this gentleman's evidence, if not downright false, is at all events greatly exaggerated.

"We now proceed to Chola. Here the petitioner has a single witness P.W. 9, Phul Singh. This man is by profession a mukhtar and he was petitioner's polling agent at Chola. He says that voters were threatened by persons acting on behalf of the respondent and were forcibly prevented

from entering the polling station. This witness admits that police officers were present. But no police officer has been produced to say that the District Magistrate's orders under section 144 Cr. P.C. forbidding the carrying of *lathis* or assemblages of more than five persons were disobeyed. Nor has any police officer nor has the presiding officer been produced to confirm the witness's assertion that there was systematic picketing. It is not even suggested that a complaint was made to the presiding officer. In view of this witness's position we find it impossible to believe his assertions and we would note that he is one of the witnesses who speaks to the distribution of exhibit 12. We would also note that this witness names a number of persons who, he says, were threatening and turning away voters. But entirely different names were given by the petitioner when he put in the particulars required of him by the respondent on the 23rd of February.

"We now proceed to *Sikandrabad* where the petitioner's witnesses are P.W. 6, Chunni Singh and P.W. 13, Mathra Prasad. Very little need be said about P.W. 13, Mathra Prasad, who was completely broken in cross-examination. He obviously did not go to Sikandrabad at all for he supposes that polling took place in the building in which it took place at the March election, whereas it really took place in another building some substantial distance away.

"There then remains *Cholas* where the petitioner's only witness is P.W. 19, Babu Ram, his nephew and polling agent. Here again the polling station was a canal bungalow, and according to this witness the bungalow was entirely surrounded by persons who made it their business to threaten and turn away voters. This witness says that he complained to a Sub-Inspector who was present on duty and he told him he could do nothing. But this Sub-Inspector has not been produced as a witness nor has the presiding officer. In their absence we find it impossible to take Babu Ram's statement seriously.

"The only other witnesses who speak of threats are P.W. 11, Pirthi Singh and P.W. 20, Karan Singh. P.W. 11, Pirthi Singh, speaks of a meeting at this village. There is nothing particular to be said against this witness. But we are certainly not prepared to hold on his uncorroborated statement that matters occurred as he alleges them to have occurred, more especially in view of our suspicions of the general nature of the petitioner's evidence. P.W. 20, Karan Singh, speaks of a meeting at Ahmadgarh where threats were held out. He says that he was on his way to Ghatal polling station when he was met by people returning, who told him that voters had been forcibly turned away. We are not inclined to believe that voters were turned away or that Karan Singh was told so. And we would note that Karan Singh is one of the witnesses who speaks of the distribution of the suspicious leaflet, exhibit 12. We are not prepared to place any reliance in the assertions of Karan Singh.

"Our conclusion is that the petitioner has failed to prove his case. Generally speaking we suspect the good faith of many of the petitioner's witnesses and we fear that false evidence has been adduced deliberately. That persons with Congress sympathies conducted active propaganda on behalf of the respondent in a number of villages before the 27th of September, and possibly in the vicinity of a number of polling stations on the 27th of September may be accepted. But in the absence of any of the officials on duty at the polling station we find it impossible to believe that the state of affairs was anything like what the petitioner's witnesses generally describe it to have been. There are moreover other reasons for distrusting a number of the petitioner's witnesses which have been set out in detail already.

"In the course of his argument learned Counsel for the petitioner detailed a number of payments to which he took objection. The first was an entry in the election expenses return showing Rs. 600 as paid by the respondent to his election agent on the 3rd of September. The election agent says in evidence that he got it on the 2nd of September. But we consider this discrepancy of no account. Arjun says that he did not pay the money until the 16th of September, which is on the face of it ridiculous and from which we consider it reasonable to suspect that the money was not Arjun's money at all, but was contributed by his sympathizers. That however appears to us to be of little material importance.

"The next entry to which objection is taken is in the election expenses return under date 9th of September, Rs. 3 for the respondent and his agent going by ekka from Khurja to Bulandshahr and back. Certainly his agent, cross-examined on his point, but without being shown the entry, did not remember making this visit to Bulandshahr. But it is clearly proved by the production of a treasury chalan that he did go to Bulandshahr on that day. The respondent certainly says that he did not go with him. But again the respondent's attention was not drawn to the entry in the election expenses return and it is very possible that he had forgotten the incident. In any case whether the respondent went or did not go, his agent certainly went, and the expense by ekka would be the same in either case. We therefore consider the petitioner's objection immaterial.

"The petitioner's third objection is under date 23rd of September showing payment of annas 8 to a stamp vendor. This was in connection with the respondent's withdrawal application. The respondent says that he paid the money to the vakil, Pandit Brahamajit Singh. But that of course is quite immaterial. Whether paid direct to the stamp vendor or to the vakil, it was paid on account of the purchase of a stamp and would reach the stamp vendor eventually.

"Then there is an objection to an item of fee paid to Lachmi Chandra, vakil, Rs. 10. Admittedly this was paid on the 3rd or 4th of September,

probably on the 4th of September. Payment, under the rules, had to be supported by a voucher, and it appears that the voucher, in the shape of a receipt from Lachmi Chandra, was not given until the 25th of October. Payment was therefore entered as made on the 25th of October, although the receipt itself showed the money received on the 4th of September. We consider the slight irregularity, if it is an irregularity, quite immaterial.

“The petitioner next objects that a number of items of expense were not entered in the return. He cites the expenses incurred by the respondent in coming in a cart one day from his village to Khurja and the expense of typing the nomination form. These appear to us to be very frivolous objections and we see no reason to suppose that any such expense was incurred. The petitioner next mentions the expenses of the respondent's journey from Meerut on the 26th of September to Bulandshahr and thence to Khurja. But we agree with learned Counsel for the respondent that these could not possibly be debited as election expenses. Then the petitioner points to an item of Re. 1 paid to one Chunni Singh but not expended by him and complains that this should have been shown under credit and debit heads instead of being ignored. This appears to us to be a most frivolous objection. The petitioner next points to Arjun's statement that Rs. 164-2-0 were spent on election work on the 26th and 27th of September. This, so far as it goes, merely indicates that Arjun knew very little of what was going on. Rs. 164-2-0 is, according to the return, the total of expenses incurred, and it is apparent that a considerable proportion of that sum must have been spent before the 26th of September, as the 27th was the polling day. The petitioner next refers to an item under date 18th of September, expense of sending certain persons in a lorry to Sikandrabad. Arjun, cross-examined about this, says that he paid the money on the 19th or 20th of September. One of his witnesses and principal workers known as Har Sarup Mehta says that it was he who paid the money on the 18th. From this learned Counsel for the petitioner argues that in fact two lorries were sent, one on the 18th by Mehtaji and one on the 19th or 20th by Arjun, and only one has been referred to in the return of election expenses. We consider this argument frivolous. Arjun cannot be expected to remember in March whether he sent a lorry on the 18th, 19th or 20th of September ; and his assertion that he paid for the lorry is obviously either a lapse of memory or an assertion not intended to amount to more than this, that it was his money that was expended.

“The petitioner's next objection is of the same nature as the above. One Narain Prasad was paid a certain sum of money. He says that he got this from Har Sarup Mehta, while the respondent's election agent Khubi Ram says that it was he who paid this money to Narain Prasad. The petitioner argues that there were two payments while only one has been shown in the return. We do not accept this argument. It

appears to us to be an instance of one of those small discrepancies that are bound to be elicited if cross-examination is at all lengthy. Narain Prasad probably got the money in fact from Khubi Ram. But a considerable time has elapsed since then and he is now under an erroneous impression that he got it from Mehtaji. In any case from whomsoever he got it there is no reason to suppose that he got it more than once.

"The petitioner's next objection is that the election returns do not give an adequate description of the payees. But in point of fact no mistake could have been made about the identity of any single payee with one possible exception, Hira Lal, who was paid Rs. 30 for copying the electoral rolls. The failure to give this man's address, his father's name and so forth could not in any way have inconvenienced the petitioner who, if he had really supposed that Rs. 30 were not paid to Hira Lal but to some one else, could easily have asked for further particulars of the man. It is perhaps desirable that payee's father's names, castes and residence should be given wherever possible. But we would not lay it down that the law absolutely insists on this. It is enough in our opinion that a man should be so described as to leave no room for doubt of his identity. With the possible exceptions of Hira Lal and the stamp vendor whose name is not given there can be no doubt of the identity of the persons set out in the respondent's return of election expenses.

"The petitioner also objects, although there was nothing about it in his petition, that the respondent did not keep regular books of account as required by the rules. On the admissions of the respondent's own witnesses regular books of account were not kept. They should have been kept and we consider it our duty to admonish and to warn both the respondent and his election agent on this account. But in the particular circumstances of the case we see no reason to suppose that failure to keep these account-books was due to anything worse than negligence. We see no reason to suppose that the return of election expenses is false in any material particular.

"Apart from the respondent's failure to keep regular books of account, a duty laid upon him by the rules, but for the neglect of which no definite penalty has been assigned, there are two matters not raised by the petitioner himself but noticed by the Commissioners in the course of the enquiry. These two matters have some practical importance and require discussion, and the most convenient place to discuss them is under the head of issue 11, although they are not actually embodied in that issue.

"The result of the failure of the respondent's agent to sign the return and the failure of the respondent and his agent to show in part C of the return the details required by the rules is that the respondent and his agent have incurred the disqualification set out in paragraph 5(4)

of the rules, the effect of which is set out in paragraph 25 of the rules. That is to say, unless Your Excellency see fit to exercise the power conferred upon you by the second part of paragraph 5(4) of the rules, you will declare the seat to be vacant under paragraph 25.

“The first point is that the respondent in part C of his election return has not set out the details that the rules require. He has set out four items of expense, one of Rs. 10 given to Kanchi Singh for travelling expenses on canvassing; one of Rs. 10-11 given to Har Sarup Mehta for his travelling expenses as polling agent; one of Rs. 10-6 to Narain Prasad for his travelling expenses as polling agent; and one of Rs. 3 to Pirbhu Lal for travelling expenses on canvassing. These are supported by vouchers in the shape of receipts from the payees. But no details of the expenditure of the payees are shown. It is true that the sums are small. But the rules require full details to be given and as a matter of principle it is essential that full details should be given. If the rules are interpreted as permitting a bare statement that a certain polling agent or canvasser spent Rs. 10, without any further detail, then they will have to be interpreted as permitting a bare statement that an agent or canvasser spent Rs. 100, without any further detail. And although there might be no great practical objection in the case of small sums, there would certainly be great practical objection in the case of large sums. In our opinion the manner in which the respondent and his election agent filed their return of election expenses was not that prescribed by the rules in respect of their return in part C.

“The second point is somewhat curious. The petitioner, it will be remembered, took the objection that the return of expenses was invalid inasmuch as it was signed by Khubi Ram who was not the respondent's election agent when he signed it. We have already found that Khubi Ram was the respondent's election agent from the 26th of September onwards. It was overlooked both by the petitioner and the respondent that in point of fact Khubi Ram had not signed the return of election expenses at all. This was signed only by the respondent. Learned Counsel for the respondent, who was given full opportunity of answering this objection as well as the objection discussed in the preceding paragraph, argued that under the rules it is only the form of declaration accompanying the return of election expenses that has to be signed by the candidate and his election agent and that the actual paper on which the return is written need not so be signed. He supports this argument by pointing to the form itself which provides a space for signatures at the end of the declaration and no such space at the end of the return. The Commissioners are unable to accept this argument. In their opinion it is clear that both papers, the return and the declaration, require the signatures both of the candidate and of his agent. Inasmuch as the agent of the respondent did not sign the return of election expenses, the

Commissioners are forced to the conclusion that this return was not lodged in the manner prescribed by the rules.

"We recommend that the petitioner pay to the respondent Arjun the sum of Rs. 400 as costs. And we draw the attention of Your Excellency to the fact that the respondent and his election agent have incurred the disqualifications set out in paragraph 5(4) of the rules.

"For reasons sufficiently set out already the Commissioners decline to declare the election of the respondent void and decline to declare the petitioner duly elected. And as regards costs the Commissioners, taking all the circumstances into consideration, consider that the petitioner should pay to the respondent the sum of Rs. 400 and that otherwise the parties should bear their own costs.

"We therefore report that we have no reason to suppose that either the respondent or his election agent or any person acting on behalf of either was at any time guilty of any corrupt practice; that we have no reason to suppose that the return of expenses filed by the respondent is false in any material particular; and that the respondent and his agent were guilty of four irregularities. The first was constituted by the respondent's failure on the 23rd of September forthwith to appoint an election agent in place of the agent whose authority he revoked on that day. The second was constituted by the failure of the respondent and his election agent to keep proper books of account. The third was constituted by their failure to give in part C of their return of election expenses the details required by the rules. And the fourth was constituted by the failure of the respondent's election agent to sign the return of election expenses. A penalty is imposed on the first irregularity only in the event of it having a material effect on the election, and we consider that it had no material effect. No penalty is imposed on the second irregularity, nor do we consider desirable in this particular case that a penalty should be imposed. We therefore conclude that the respondent Arjun, the returned candidate, was duly elected."

CASE No. XXX

Burdwan Division South (M.) 1924

(BENGAL LEGISLATIVE COUNCIL.)

MAULVI MUHAMMAD SUHRAWARDY *Petitioner,*

versus

MAULVI ZUHOOR AHMED *Respondent.*

Withdrawal of petition allowed.

THIS is a petition of Maulvi Muhammad Suhrawady against the election of Maulvi Zuhoor Ahmed from the Burdwan Division South (Muhammadan) constituency. The latter was elected by the narrow majority of three votes. The petitioner asked for a scrutiny and recount on certain grounds. The respondent filed a recrimination petition under rule 42 of the Bengal electoral rules after depositing the security required under rule 35, and intimated that he would give evidence that the election of the petitioner would have been void if he had been the returned candidate.

Issues were framed and witnesses examined. We were considering whether the petitioner had made out a *prima facie* case for a scrutiny and recount when the petitioner filed an application for leave to withdraw from his petition. The respondent did not oppose the petition of withdrawal. He in his turn gave up his petition of recrimination. The parties agreed to bear their own costs.

The petitioner stated that he was in bad health and that he realized that his petition involved a prolonged enquiry, which he was unable to attend to. We examined the petitioner and the respondent and we are satisfied that the petition of withdrawal has not been induced by any bargain or consideration. We therefore allow the petition be withdrawn. We recommend that the parties should bear their own costs.

CASE No. XXXI

Calcutta North (N.-M.U.) 1924

(BENGAL LEGISLATIVE COUNCIL.)

SASHI KUMAR SEN GUPTA *Petitioner,*

versus

JATINDRA NATH BASU *Respondent.*

Inquiry limited to those charges regarding which particulars had been given. Tribunal directed petitioner to give names of voters alleged to have been conveyed in taxis.

Recount refused.

THE petitioner charged Babu Jatindra Nath Basu with "being guilty of practically every sort of corrupt practice enumerated in schedule V of the Bengal electoral rules and regulations". No particulars were given except in respect of the corrupt practice mentioned in part II, section 5 of the schedule, viz., "the hiring, employment, borrowing or using for the purposes of the election of any boat, vehicle or animal usually kept for letting on hire or for the conveyance of passengers by hire". Paragraph 7 of the petition stated that Jatindra Nath Basu was by himself and other persons on his behalf guilty of this corrupt practice. Among others nine taxi-cabs were specifically mentioned as having been used by him. The petitioner further alleged that on the 18th December, 1923, at the counting of votes when the ballot-boxes were opened by the returning officer, his seals were not found on some of the boxes, and that their covering bags and some of the seals were found broken: it was further, he alleged, found that the number of the ballot-papers in some of the ballot-boxes did not agree with the number of the ballot-papers as given by the presiding officers in their ballot-paper account.

Before the date fixed for the trial of the petition, the respondent submitted that no particulars had been given of the various alleged corrupt practices, and that the petition ought to be dismissed so far as it was founded on corrupt practices of which no particulars were given as required by law. A copy of the respondent's petition was given to the petitioner on the day fixed for the hearing of the case. The case was limited to the two charges relating to the hiring, etc. of taxi-cabs, and the absence of seals on the bags and boxes. The petitioner was directed to give as far as possible particulars "of the other persons mentioned on his behalf" mentioned in his petition, and to indicate some voters by name or number who were alleged to have been conveyed in the taxis mentioned in the petition. The petitioner supplied particulars mentioning three agents who engaged cabs and four canvassers and workers on behalf of the respondent who accompanied at least 50 voters in the taxi-cabs and other cabs alleged to have been let out for hire from "the latter's destinations to the polling stations". The names of 11 voters were given. The petitioner examined 39 witnesses including himself; the respondent 14 witnesses including himself.

As regards the non-compliance of the regulations relating to sealing bags and boxes the returning officer, Mr. Roxburgh, was examined, and deposed that no tampering was possible, regard being had to the arrangement, though in transit it was possible that a seal or two on the outer gunny bags got broken or fell off. There was no complaint as regards the ballot-boxes themselves. The Commissioners reported that the position of the petitioner is "that he wishes to draw attention to the

subject for future guidance. He desires that gunny bags should not be used, that better bags like the postal bags should be used, and that there should be a record as to who was in charge of the boxes up to the date of counting. We can leave the matter there ”.

“The suggestion that there may have been tampering because of the discrepancy between the figures of the presiding officers and the figures actually found in the ballot-boxes appears to be even more groundless. There were nearly 2,000 ballot-papers used. The discrepancy is only 5. According to the return under regulation XLIX every ballot-paper issued to a voter may not have gone into the ballot-box. It appears again that voting for the Indian Legislative Assembly was going on at the same time. In this constituency three ballot-papers were rejected, because they were meant for the Indian Legislative Assembly. It is possible that these five electors of this constituency put their papers in boxes meant for the Indian Legislative Assembly and did not eventually exercise their right of vote. We were repeatedly asked to send for the ballot-papers and hold an enquiry. We are surprised that it should be thought necessary to institute any enquiry on such slender materials. It is not shown that there was any non-compliance with any rule or regulation.”

“As regards the corrupt practice¹ mentioned in part II, section 5 of the schedule, the Commissioners report : “Under the English law it is now an illegal hiring to let or hire or employ or use for the purpose of conveying electors to and from the polls any public stage or hackney-carriage. The offence of illegal hiring becomes an illegal practice when committed by the candidate, election agent or sub-agent and when so committed, the election may be set aside. (Parker, pages 294-295). The illegal practice must be brought home to the candidate or his agent. Where several hired motor-cars were lent to a candidate by a friend, but it was proved that, although the candidate had asked the friend for some cars, he did not know and had no reason to suppose the cars sent had been hired, it was held that the friend not being an agent no illegal practice, for which the candidate was responsible, had been committed (*East Dorset*, 6 O’M. & H., pages 37 and 48). With us (the section has been quoted above) it is apparently not necessary to show that the candidate or his agent hired the taxis ; but on the other hand the election can only be set aside if it is proved that the result of the election has been *materially affected* by the hiring or use of such taxi-cabs.”

¹ Now omitted from the schedule of the Indian Corrupt Practices Order, 1936.

CASE No. XXXII

Calcutta South (N.-M.U.) 1924

(BENGAL LEGISLATIVE COUNCIL.)

S. N. HALDER *Petitioner,*

versus

S. N. MALLIK *Respondent.*

Omission to date a nomination paper is a technical not a material irregularity. The provision is directory and substantial compliance is all that is required.

The chairman of the Calcutta Corporation is not an "official" within the meaning of the Government of India Act, as his salary is paid out of municipal funds.

At the time of scrutiny the petitioner, Mr. Halder, objected to Mr. Mallik's nomination on the ground that the latter, as chairman of the Calcutta Corporation, was "an official" and was ineligible for election. The respondent, on the other hand, objected to Mr. Halder's nomination on the ground that no date had been put in the space provided for it in the declaration.

The returning officer over-ruled Mr. Halder's objection on the ground that the position of Mr. Mallik's status did not come under regulation XXI, and was outside his province. He, however, accepted Mr. Mallik's petition and rejected Mr. Halder's nomination under regulation XXI¹ (1) (iii). Mr. Mallik was declared to be duly elected and a notification to that effect was published in the *Calcutta Gazette*. The Commissioner reported :—

"The points that we have to decide are two. The first is whether the omission of the date in the declaration part of the nomination paper is sufficient in itself to render the nomination a nullity and whether in consequence the returning officer was right in rejecting it under regulation XXI (1) (iii).

"The second is whether Mr. Mallik as chairman of the Calcutta Corporation is an 'official' within the meaning of section 134 of the Government of India Act, and is therefore disqualified for election under the provisions of section 80B of the Act.

"We proceed to consider the first question. Rule 11 of the Bengal electoral rules of 1923, part IV, relates to the nomination of candidates for election and sub-section (3) runs as follows: 'On or before the date so appointed for the nomination of candidates each candidate shall either in person or by his proposer and seconder together between the hours of 11 o'clock in the forenoon and 3 o'clock in the afternoon deliver to the returning officer or such other person as may be authorized in this behalf by regulation, a nomination paper completed in the form prescribed in schedule 3 and subscribed by the candidate himself as assenting to the nomination and by two persons as proposer and seconder whose names are registered on the electoral roll of the constituency'. The point for our decision is whether the omission to fill in the date in the declaration portion signed by Mr. Halder is fatal to the validity of the nomination as a whole."

* * * * *

After discussing the arguments the Commissioners reported: "We think that if it had been the intention of the legislature to make the date of the acceptance of the nomination by the candidate an integral part of the nomination paper it would have made a special provision

¹ Regulation XXI (1) is reproduced at the end of the report.

to that effect in the rules. The introduction of the words 'and duly dated' after the word 'completed' would have been all that was necessary. In point of fact the rules are entirely silent about the date upon which this declaration is to be signed.

The conclusion therefore at which we arrive is that while the provisions in the rules relating to the preparation of the nomination paper are mandatory, they should not be so regarded so far as the filling up of the date of acceptance of the nomination is concerned. At the highest they are directory and there is abundant judicial authority for the proposition that where a provision is merely directory, a substantial compliance therewith is all that is required. In the case of *Sham Chand Basak vs. The chairman of the Dacca Municipality* (I.L.R. 47 Calcutta, 524) the learned judges referred to a number of English cases wherein the validity of an election was in question. In the case of *Woodward vs. Sarsons*,¹ Lord Coleridge, C.J., made some comment on the effect of section 13 of the Ballot Act of 1872. That section provides that "no election shall be declared invalid by reason of a non-compliance with the rules contained in the first schedule to this Act . . . if it appears to the tribunal having cognizance of the question that the election was conducted in accordance with the principles laid down in the body of this Act and that such non-compliance did not affect the result of the election". Lord Coleridge held that the section was inserted *ex abundanti cautela* and that the same rule would have applied by virtue of the common law, even if the section had not existed. The substance of the matter as observed in the case of *Sham Chand Basak* is that "the infringement of a rule does not necessarily invalidate the election as it would have done if the rule had been deemed mandatory in character".

In this country there is no Ballot Act or common law but in our judgment the principles underlying section 13 of the Ballot Act should be considered with reference to the electoral rules upon which we are called to adjudicate and if we may, with a slight modification, borrow the word used in the judgment we should say that the infringement of the rule requiring the date to be given does not necessarily invalidate the nomination as it would have done if the rule had been deemed mandatory in character.

In the present case we have no hesitation in finding that the provisions of rule 11 which we regard as mandatory, namely, the presentation to the returning officer of a completed form by the candidate and his acceptance of the nomination have been complied with. The omission by the petitioner to record the date in the declaration though a technical irregularity as pointed out by the returning officer, is, in our opinion, no more than unsubstantial departure from the law, and we hold that

¹ Indian Candidate and Returning Officer, page 342 (Clarendon Press, Bombay)

the returning officer was in error in refusing to accept the nomination especially when it had been signed by the petitioner in his presence. We are therefore of opinion that the improper refusal of the petitioner's nomination paper by the returning officer has materially affected the result of the election and that the election of the returned candidate should be held to be void.

We now come to the second branch of this enquiry whether Mr. Mallik as chairman of the Calcutta Corporation was an "official" under the Government of India Act and was therefore ineligible for nomination or election. Section 80B of the Government of India Act lays down that : "An official shall not be qualified for election as a member of a local Legislative Council" and section 134 says that "the expressions 'official' and 'non-official' where used in relation to any person mean respectively a person who is or is not in the civil or military service of the Crown in India". It is further provided that the holders of certain offices may be excluded by rules under the Act but that these must be specified in each case. Under the powers conferred by sections 134 and 129A of the Government of India Act a notification no. 614G, dated 9th September, 1920, was issued and under it the rules called "Non-official (Definition) Rules" were framed. Rule 2 is in these terms: "The holder of any office in the civil or military service of the Crown, if the office is one which does not involve both of the following incidents, namely, that the incumbent—

(a) is a whole-time servant of Government, and

(b) is remunerated either by salary or fees,

shall not be treated as an official for any of the purposes of the Government of India Act."

It is therefore contended on behalf of the petitioner that Mr. Mallik as chairman of the Calcutta Corporation is an "official" as he is a whole-time servant of Government and is remunerated by salary which is fixed by Government. The learned Counsel has referred to a number of sections in the Calcutta Municipal Act which show that the chairman is appointed by Government and may be removed by Government and that Government exercises control over him in certain respects. He urges that the question by whom he is paid his salary is immaterial. It is contended that he is in the civil service of the Crown in India and is therefore debarred from election to the Council. Reference is made to section 14 of the Indian Penal Code where the words "servant of the Queen" denote "all officers or servants continued appointed, or employed in India by or under the authority of the statutes 21 and 22 Victoria, chapter 106 or by or under the authority of the Government of India or any Government" and to section 21 where "a public servant" is defined. Reference is further made to the definition contained in section 2 (17) (h) of the Civil Procedure Code where a "public officer"

is said to include "every officer in the service or pay of the Government or remunerated by fees or commission for the purpose of any public duty". This definition has been judicially held to include the Administrator General, the Official Trustee and the Official Assignee.

Learned Counsel for the respondent on the other hand refers to the rules made under section 96B of the Government of India Act which are now known as "The Fundamental Rules".

Rule 2 explains that a Government servant is one whose pay is debitable to civil estimates in India, while rule 9(7) defines *Foreign service* as service in which the Government servant receives his substantive pay with the sanction of the Government from any source other than the general revenues of India. *General revenues* are defined in rule 9(8) while *local funds* which include corporation funds are defined in rule 9(14). The chairman of the Calcutta Corporation is, under section 144(1) of the Calcutta Municipal Act, paid out of municipal funds, and he therefore does not come within the definition of the rules contained in the notification no. 614G, dated 9th September, 1920.

We consider that the source from which a Government servant draws his salary is one of the tests for determining whether he is a servant of the Crown or not, and whereas in the present case, the chairman of the corporation receives his salary from the municipal funds we cannot think that he is a Government servant within the meaning of the notification. This, however, is only one test. A further test is by whom he is liable to be dismissed. Under section 96B of the Government of India Act every person in the civil service of the Crown in India holds office during His Majesty's pleasure and may not be dismissed by any authority subordinate to that by which he was appointed. The chairman of the corporation is appointed by Government and under section 11 he may be removed from his office by Government at its discretion, but the section goes on to say that he *shall* be removed from his office if his removal is recommended by a resolution which has been passed at a special meeting and in favour of which not less than two-thirds of the Commissioners present at the meeting have voted. When this test is applied it is evident that the chairman is not in the civil service of the Crown in India and is, therefore, not an "official" who is *ipso facto* debarred from election. We accordingly decide the second question against the petitioner.

The result, therefore, is that we hold that the returned candidate Mr. Mallik has not been duly elected owing to the improper refusal of the petitioner's nomination paper by the returning officer and that the election is, therefore, void. On the question of costs we recommend that the parties should bear their own costs and that the fees of the Advocate-General should be paid by them in equal shares.

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* * * * *

XXI (1) The returning officer shall then examine the nomination papers and shall decide all objections which may be made to any nomination, and may, either on such objection or on his own motion, after such summary inquiry, if any, as he thinks necessary, refuse any nomination or any of the following grounds :—

- (i) that the candidate is ineligible for election under rule 5 or rule 6 ; or
- (ii) that a proposer or seconder is disqualified from subscribing a nomination paper under sub-rule (4) of rule 11 ; or
- (iii) that there has been any failure to comply with any of the provisions of rule 11 or rule 12.

CASE No. XXXIII
Calcutta and Suburbs (M.U.) 1927
(LEGISLATIVE ASSEMBLY.)

MUHAMMAD RAFIQUE *Petitioner,*

versus

YACOOB CASSIM ARIFF *Respondent.*

At a recount the returned candidate was unseated and the petitioner declared duly elected because of the improper reception of votes.

THE petitioner asked to have the election of the respondent declared void and to have himself declared the duly elected candidate mainly on the ground that the result of the election had been materially affected by the improper reception of votes. It was proved that certain persons who were not voters for the Legislative Assembly voted in the election, and it was held that their votes must be struck off. Three Hindus were named as having voted in this Muhammadan constituency, and the electoral roll showed that ballot-papers were issued to them though they had no right to vote. Two of them denied having voted and the third was silent about it. It was not possible to trace their votes as the counterfoils concerned showed only the serial number of the voter in the ward roll without any ward number. This the Commissioners remarked was a serious irregularity as it rendered it impossible to check those votes. It was proved that one voter voted twice and that both his votes were given to the respondent. One of the votes was thus struck off as invalid. Another witness admitted voting twice but only one ballot-paper could be traced. In two cases evidence was given of electors who were dead, but in whose names votes were recorded as was proved by the ballot-papers and counterfoils. Those votes were also struck off. The death of three other persons was also proved, but it was not found possible to trace whether any votes were recorded in their names owing to the irregularity mentioned above.

Evidence was given and accepted to prove that two persons were absent at the time of the election and did not themselves vote. The ballot-papers, however, showed that votes were recorded in their names for the respondent. These two votes were struck off.

As the counterfoils of the ballot-papers showed only the serial number of the voter in the ward roll without any ward number, the Commissioners were unable to trace the votes of those persons who were alleged to have been personated.

Lastly, the Commissioners found that ordinary votes given in the names of four persons, named in the tendered vote lists, must be struck off and votes for five persons in the tendered votes list should be added to the petitioner's total. As a consequence the respondent's total of 1,421 votes was reduced to 1,405. The petitioner had obtained 1,402 votes; one vote was deducted and five votes were added thus raising his total 1,406 and giving him a majority of one. The election of the respondent was set aside and the petitioner declared duly elected to the seat.

CASE No. XXXIV

Cawnpore District (N.-M.R.) 1931•

(UNITED PROVINCES, LEGISLATIVE COUNCIL.)

RAI SAHIB BHAGWAN DAS *Petitioner,*

versus

THAKUR BISHAMBAR SINGH *Respondent.*

A person whose name is entered on the electoral roll of two constituencies can stand as a candidate for one of them.

The electoral roll as revised by the order of the revising authority is binding on the election Commissioners, excepting as regards statutory disqualifications.

THE returning officer rejected the petitioner's nomination paper on the grounds that petitioner's name appeared on the electoral list of Cawnpore City (N.-M.U.) constituency, and therefore could not appear in the district constituency according to the last proviso of rule 7 of the electoral rules.

Extracts from the Commissioners' report are as follows :—

It is an admitted fact and is also well established from the oral and documentary evidence adduced in the case that the name of the petitioner was entered in the electoral roll of the urban constituency of the city of Cawnpore and that when the electoral roll for the non-Muhammadan rural constituency for the district of Cawnpore was being revised, he on the 30th of July, 1930 applied to have his name entered in that constituency and the revising authority on the 15th of August, 1930 ordered that his name be so entered and it was subsequently done. It has now been most strenuously contended on behalf of the respondent that in view of the last proviso to rule 7(1) of the United Provinces electoral rules, which lays down that no person shall be entitled to have his name registered on the electoral roll of more than one general constituency, the nomination paper of the petitioner has been rightly rejected and that he could neither vote nor stand in either constituency. Now the reasons on which the returning officer can refuse any nomination are given in regulation 9(1) of regulation for the election of members of the Legislative Council of the United Provinces. There is no reference in this sub-regulation to any disability arising from an entry of the name of a candidate in two electoral rolls. Rule 5 of the electoral rules deals with the general disqualifications for being elected a member of the Council. There is no mention in this rule of any disqualification arising from registration in more than one constituency. Rule 7 deals with the general conditions of registration and disqualifications of voters and one of the disqualifications for being registered as voter in a general constituency is given in the last proviso of sub-rule (1) that if a person is registered as a voter in one general constituency, he cannot have himself registered as a voter in another constituency. The above sub-rule in fact seems to contemplate the possibility of error in the preparation of the electoral roll, a duty performed by a registering authority appointed by the Local Government and not by the voters. It does not seem to attach any disability to a voter merely because of any error in the rolls, but if a voter were to take advantage of the above error and were to vote at a general election in more than one general constituency, he is penalized to the extent that his vote is void as laid down in rule 10(2). Rule 10(2) is a penal clause and provides that if any person is proved to have voted at the election in contravention of the proviso to sub-rule (1), his vote shall be void. The proviso to sub-rule (1) provides that no person shall vote

at any general election in more than one general constituency. The above rules seem to suggest that if a person is registered as a voter in more than one general constituency, he can exercise his right of voting in one of those general constituencies but not in all of them. This shows that in spite of the registration of a person on the electoral rolls of two separate general constituencies, he does not cease to be a voter and is entitled to give at least one vote. When a person whose name is registered in two electoral rolls of two separate general constituencies does not cease to be a voter of those constituencies and can exercise his right of vote at least in one of those constituencies, there does not seem to be any reason why he cannot stand as a candidate from one of those constituencies.

If the legislature had really intended that a person whose name was registered in two electoral rolls could not stand as a candidate from any of those constituencies, it would have clearly manifested it in express words or at least by clear implication and beyond reasonable doubt. A disability rule must always be strictly construed. The rule of strict construction requires that an enactment shall be so construed that no cases shall be held to fall within it which do not come within the reasonable meaning of its terms and within its spirit and scope. Where an enactment entails penal consequence, no violence must be done to its language in order to bring people within it. On the contrary, care must be taken that no case is included therein which does not clearly come under its express terms (Maxwell's Interpretation of Statutes, 4th edition, page 396). There is no provision in the rules that a person who is registered in two electoral rolls of two general constituencies cannot stand as a candidate from one of those constituencies, and we can find no justification for an attempt to read it into the rules. We are, therefore, of opinion that there is nothing in the electoral rules to warrant the finding of the returning officer that because the name of the petitioner appeared on the electoral rolls of two constituencies he was disqualified as a candidate in one of them.

It was next urged that as it was at the instance of the petitioner himself that his name was entered in the electoral roll of the non-Muhammadan rural constituency, so he was estopped from standing as a candidate from that constituency. We do not think that any question of estoppel arises in such cases, as it cannot be said that the petitioner by any Act, omission or declaration of his induced the respondent to do anything which he would not otherwise have done or to change his position. There is nothing in the present case to show that the respondent stood as a candidate merely because the petitioner got his name entered in the electoral roll of both the constituencies and otherwise would not have done so. Under the circumstances, we do not think that the petitioner is in any way estopped from standing as a candidate in the non-Muhammadan rural constituency.

We, therefore, hold that the nomination of the petitioner was improperly rejected upon the ground that his name appeared as a voter in two electoral rolls, one of them being the electoral roll of the constituency for which he was nominated.

It was next urged that the revising authority in dealing with the application of the petitioner as to the entry of his name in the electoral roll of the non-Muhammadan rural constituency did not observe the last proviso to rule 7(1) and consequently the entry of his name in the said electoral roll was improper. Regulation 4 shows that the revising authority has full jurisdiction to hear and determine all claims and objections which have been duly made and after such enquiry and after hearing such persons as to him may appear necessary to order any addition or alteration in the electoral roll. There is nothing on the record to show that it was, in any way, brought to the notice of the revising authority that the name of the petitioner appeared in the electoral roll of the urban constituency and he was therefore not entitled to have his name entered in the rural constituency and the revising authority in spite of that knowledge ordered his name to be so entered. On the other hand, the evidence of Babu Mangli Prasad shows that when the petitioner filed his application, a notice was put up outside the office of the revising authority fixing the 15th of August, 1930, for hearing the application and no one appeared to prefer any objection on or before that day and consequently an *ex parte* order was made to have his name added in the list. The revising authority, Mr. Gauri Prasad, was examined as a witness in this case, but nothing has been asked of him about the entry in question. It appears that as no objection was preferred to the application of the petitioner by any one, and he had all the qualifications of being entered as a voter in the non-Muhammadan rural constituency, so the revising authority ordered his name to be entered as such. It is clear that he had jurisdiction to pass the above order and if he in the exercise of that jurisdiction passed the order, though erroneously, it cannot be said that his order is improper. The celebrated dictum of Lord Hobhouse as laid down in *Malkurjan vs. Narhari* (XXV, Bombay, 337 at 347, P.C.) is to the same effect. It is as follows :—

“ A court has jurisdiction to decide wrong as well as right. If it decides wrong, the wronged party can only take the course prescribed by law for setting matters right, and if that course is not taken, the decision however wrong cannot be disturbed. The real complaint here is that the execution court construed the code erroneously. Acting in its duty to make the estate of Nagappa available for payment of his debt, it served with notice a person who did not legally represent the estate and on objection decided that he did represent it. But to treat such an error as destroying the jurisdiction of the court is calculated to introduce great confusion in the administration of law.”

The above dictum has been quoted with approval by Mukerji, A. C. J. in the full bench case of *Hirdayanath Rai vs. Ram Chander Bose* (XXII, Calcutta Weekly Notes, 723 at 783), and His Lordship after quoting the above dictum observed as follows :—

“ Since jurisdiction is the power to hear and determine, it does not depend either upon the irregularity of the exercise of that power or upon the correctness of the decision pronounced, for the power to decide necessarily carries with it the power to decide wrongly as well as rightly.”

His Lordship further on at page 754 observes :—

“ It is plain that however erroneous the order may be, it is not an order made by a court without jurisdiction. It is, on the other hand, an order made by a court of competent jurisdiction acting with material irregularity in the exercise of its jurisdiction. The order cannot consequently be deemed null and void.”

It is thus perfectly clear from the above remarks that where an officer has jurisdiction to decide a matter and he decides it, though erroneously, his decision cannot be said to be null and void or improper. The party aggrieved is clearly at liberty to impugn it and may in an appropriate proceeding invoke the aid of a superior tribunal to set it aside. Rule 9(6) provides that any person can apply to such authority as may be appointed in this behalf by the Local Government for the amendment of any electoral roll for the time being in force, and the Local Government by notification in the gazette may direct the preparation of a list of amendments thereto. The respondent or any other person who may have found himself aggrieved with the order of the revising authority therefore could have applied under the above rule for the amendment of the electoral roll, but no such action was taken by any one, and the order, therefore, cannot be said to be null and void or improper. It was said that the respondent had no notice of the claim or of the order passed by the revising authority and consequently did not raise any objection to the petitioner's application for the entry of his name or for the removal of his name afterwards by way of amendment, but there seems no provision either in the rules or in the regulations that each and every voter should be informed of every claim for an entry of a name or of the order passed thereon. Regulation 3(5) lays down that if at the time of the revision of the electoral roll a claim is made, a notice will be put up outside the court house of the same and the evidence of the election clerk shows that it was so done and the respondent did not take any advantage of it and did not raise any objection at the proper time. It is thus the respondent's own fault that he did not take any advantage of the notice put up outside the Collector's court. As to the order passed by the revising authority regulation 5 provides that the electoral roll so amended shall be republished in the manner prescribed in regulation 2, and it was done and it cannot now be said that the respondent had no notice of the order.

The above contention, therefore, has no force. We are, therefore, of opinion that the entry of the name of the petitioner in the electoral roll of the non-Muhammadan rural constituency was not improper.

Assuming, however, for the sake of argument that the entry of the name of the petitioner in the electoral roll of the non-Muhammadan rural constituency was improper, then the next question arises whether the above objection can be taken before the Commissioners or not. Rule 9(3) of the electoral rules provides that the orders made by the revising authority shall be final and the electoral roll shall be amended in accordance therewith and shall, as so amended, be republished in such manner as the Local Government may prescribe. The words "final" in the above rule clearly suggests that the order passed by the revising authority cannot be questioned before the returning officer or before the election tribunal. In *Stowe vs. Joliffe* (9 L.R.O.P. 734) it has been held that the register (electoral roll) is conclusive not only on the returning officer but also on every tribunal which has to enquire into elections, except only in the case of persons prohibited from voting by any statute or by the common law of Parliament, that is, persons who from some inherent or for the time immovable quality in themselves have not either by prohibition of statutes or common law the status of parliamentary electors, such as peers, women, persons holding certain offices or employments under the Crown, persons convicted of crimes which disqualify or the like. This case was followed in the *Pembroke Borough* case (5 O.M. & H., 135), where Mr. Justice Channel at page 144 observed as follows :—

"When it is said that the register is to be conclusive, what is meant is that the errors in it must stand. If it were always absolutely correct, there could be no importance in saying that it was to be conclusive. It seems to me that the policy of the legislature has from the time of the Reform Act of 1882 until the Ballot Act been to make it necessary to raise all questions as to rights to vote in the registration court and to do this by preventing their being raised at any other time or in any other manner."

The Commissioners referred to the following Indian cases :—

Bhagalpur North (see page 165), *Purnea* (see page 592), *Rawalpindi and Lahore Divisions* (see page 611), *Saran South*¹, *Bengal Marwari Association* (see page 165).

It is thus abundantly clear that the electoral roll as revised by the order of the revising authority is binding on the election Commissioners and they cannot go behind it in respect of the qualifications of the voters excepting statutory disqualifications. We, therefore, hold that the

order of the revising authority directing the insertion of the petitioner's name in the non-Muhammadan rural constituency, Cawnpore, is final and is binding on us and that we have no power to question its correctness or legality or the legality or correctness of the entry made in accordance herewith in the electoral roll.

It is conceded that the failure to make a return of election expenses will not by itself disqualify the petitioner from maintaining his petition, but will only serve to disqualify him from standing as a candidate for a period of five years, as laid down in rule 22(4). This issue therefore raises the question of the petitioner's disqualification in future rather than his present disqualification to maintain the application.

It is extremely doubtful whether a candidate whose nomination has been rejected is required to lodge a return of his election expenses. However, as the petitioner in the present case has lodged a return of his election expenses, the above question does not arise. It is said that the above return was not properly lodged as it was not delivered to the returning officer personally and was not within time and contained false statements.

As to the return of election expenses being delivered to the returning officer himself, we do not find any provision in the rules or in the regulations to the above effect. Rule 19(1) only provides that it will be lodged with the returning officer. The evidence of the election officer, Mr. Gauri Prasad, shows that the returning officer was probably in camp and the petitioner swore his declaration before him and gave it in at the office and it was sent to the returning officer, who, in accordance with rule 19(5) ordered a notice to be published in the gazette and it was so done. We think that it was a proper lodging of the return of election expenses within the meaning of rule 19.

As to its being beyond time, rule 19(1) provides that the return of election expenses will be lodged within 35 days from the date of the publication of the result of an election under sub-rule (9) to rule 14. There is nothing on the record to show how the return was lodged beyond time. The voting in respect of the non-Muhammadan rural constituency took place on the 27th of September, 1930. (See *United Provinces Gazette*, dated September 13, 1930). The result of the election must have been published some time later on. The petitioner filed his return of expenses on the 30th of October, 1930. It was, therefore, clearly within 35 days of the report of the result of the election, and is within time. We do not think that the return of election expenses was filed beyond time.

As to the return being incorrect, the respondent has examined Mr. E. V. David to prove that he was engaged by the petitioner to argue out the objection against his nomination and must have paid him some fee, but did not show any such expense in the return. Mr. E. V. David

denies that he was paid anything in respect of the arguing out the objection raised against the nomination of the petitioner. There is no other evidence to show that the return is in any other respect incorrect. We are, therefore, of opinion that the return of election expenses as filed by the petitioner was correct. We, therefore, hold that the return of election expenses incurred by the petitioner was properly lodged within the prescribed time and was not false in any material particular.

It is clear from our findings that the nomination of the petitioner was rejected improperly and without any justification. The English as well as the Indian cases show that the moment the returning officer has improperly and without justification refused to receive a nomination paper presented to him within the time prescribed, the presumption arises that the result of the election has been materially affected. Improper refusal of a nomination paper by the returning officer is in our view so grave an irregularity that this presumption would require the strongest and most conclusive proof for its rebuttal and it lies heavily on the respondent to rebut the presumption so raised. We do not think that the correctness of the above proposition is open to doubt, but in support of the general principle we may refer to the following English and Indian cases. The English cases are :—

Islington case (1901), 5 O'M. & H., 120; *North Durham* case (1874), 2 O'M. & H., 152; *North Meath* case (1892), 4 O'M. & H., 185; *Davies vs. Kensington* (1874), L.R. 9 C.E., 720).

The Indian cases on the point laying down the above proposition are :—

*Rohtak*¹, *Calcutta South* (page 261), and *Golaghat* (page 377).

The result is that the election of the respondent is void. Our report, therefore, is that the election of the respondent to the Council is void, and no one else claims the seat.

¹ I E P. 186.

CASE No. XXXV

Central Provinces, Commerce and Industry, 1927

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SETH MATHURADAS BULAKIDAS MOHOTA .. *Petitioner,*

versus

RAO BAHADUR D. LAXMINARAYAN .. *Respondent.*

One declaration of agency if filed with several nomination papers held to “ accompany ” each and everyone of the nomination papers.

The electoral roll is conclusive not only on the returning officer but also on every tribunal which has to enquire into elections, except only in cases of persons prohibited by statute from voting.

At the last general election, there were two candidates for the one seat allotted to the C.P. Commerce and Industry constituency, viz. (1) Mathuradas Mohota, and (2) Rao Bahadur D. Laxminarayan. The former was nominated by means of six nomination papers and the latter by means of four nomination papers on 21st October, 1926. On the following day, i.e. 22nd October, 1926, which was the date fixed for the scrutiny of nomination papers, the returning officer rejected all the six nomination papers of Mathuradas as invalid and held that Rao Bahadur D. Laxminarayan had been duly nominated; and as he was the only duly nominated candidate left for the seat, he was declared duly elected. Against this decision Mathuradas Mohota filed the present election petition.

The most important question for consideration before us is whether the petitioner's nomination was improperly refused by the returning officer. It appears that on the 21st October, 1926, which was the date fixed for the filing of nomination papers, the petitioner at about 1-10 P.M. filed four nomination papers (marked as nos. 5, 6, 7 and 8) before the returning officer and along with them, but not attached to any one of them, he filed a declaration appointing himself as his election agent for the election. Some time after these five documents were filed, Rao Bahadur V. R. Pandit, who was the legal adviser of the petitioner, went into the room of the returning officer and enquired of him whether it was necessary that a separate declaration should be attached to each nomination paper, and on being told that "he must decide that for himself" (*vide* order of the returning officer filed in this case), he got two fresh nomination papers prepared, and these two nomination papers (marked as nos. 9 and 10) with the necessary declaration of agency attached to each, were filed by the petitioner on the same date (21st October, 1926) at about 2-30 P.M. Five minutes after this, the petitioner filed two more loose declarations of agency intending that they should be treated as accompaniments to any two out of the four nomination papers filed by him previously on that date at about 1-10 P.M. It is admitted on behalf of the petitioner that neither when he filed one loose declaration of agency along with four nomination papers at about 1-10 P.M., nor when he filed two more loose declarations of agency at about 2-35, did he give any intimation to the returning officer that the three loose declarations so filed should be treated as accompaniments to three particular nomination papers out of the four such papers filed by him at 1-10 P.M.

On the 22nd October, 1926, which was the date fixed for the scrutiny of nomination papers, when the returning officer began to scrutinize the nomination papers, the legal adviser of the respondent objected to petitioner's nomination papers nos. 5-8 on the ground that none of them was accompanied by a declaration of agency as required by rule 11(5)

of the C.P. electoral rules, and to nomination papers nos. 9 and 10 on the ground that they contravened the provisions of sub-rule (4) of rule 11 inasmuch as the proposers and seconders in those nomination papers were persons who had already proposed or seconded the petitioner in the first four nomination papers marked 5-8. Both these objections prevailed with the returning officer, who accordingly rejected all the six nomination papers filed by the petitioner.

Rule 44 (1) (c) of the C.P. electoral rules provides *inter alia* that if in the opinion of the Commissioners the result of the election has been materially affected by the improper acceptance or refusal of a nomination paper, the election of the returned candidate shall be void ; and it has been held that the improper refusal of a nomination paper is an irregularity which materially affects the result of an election within the meaning of the above rule. In Parker's Election Agent also (3rd edition, page 526), it has been observed on the authority of *Davis vs. Lord Kensington* (L.R. 9 C.P. 729) that if a returning officer, improperly and without justification, refuses to put a candidate in nomination and declares his opponent duly elected, the election will be set aside. It is therefore necessary to consider whether the view taken by the returning officer in rejecting all the six nomination papers of the petitioner is correct.

We shall first of all consider the question of the validity of nomination papers nos. 5-8, and if we come to the conclusion that they or any of them were valid, it will be unnecessary to discuss the validity of the remaining two nomination papers (9 and 10) filed by the petitioner. The returning officer rejected nomination papers nos. 5-8 on the ground that they did not comply with the provisions of sub-rule (5) of rule 11. That sub-rule (we quote only the material portion) says that every nomination paper delivered under sub-rule (3) shall be accompanied by a declaration of agency by the candidate and that no candidate shall be deemed to be duly nominated unless such declaration is delivered along with the nomination paper. Sub-rule (3) refers to and contemplates the delivery of a "nomination paper" by each candidate, either in person or by his proposer and seconder together, but it does not forbid the delivery of more nomination papers than one by or on behalf of each candidate. Under that sub-rule, although a candidate may have delivered a nomination paper, it is open to each pair of voters (one as proposer and the other as seconder of his constituency), who support his candidature to deliver a nomination paper duly subscribed by him as assenting to the nomination. In Hammond¹ (*vide* page 40), it is observed : "A candidate may have several nomination papers and in some constituencies in England this practice is followed in order to show that the candidate

¹ Indian Candidate and Returning Officer.

has the support of all classes of society including local persons of importance." Again, at page 105, the author says "A candidate may be nominated more than once. To guard against the danger of a faulty nomination paper it is wise to take this precaution. Further it affords the candidate the opportunity of showing that he has the support of all classes or of people from various parts of the constituency". Thus it is clear that while each candidate must be nominated by a separate nomination paper, it is permissible, nay desirable, to nominate him by means of several nomination papers. But every one of such nomination papers, to be valid must comply with the necessary formalities prescribed by the electoral rules and regulations, one of such formalities being that it should be accompanied by a nomination paper. The question now is whether the four nomination papers filed by the petitioner along with a single loose declaration of agency complied with all the necessary formalities. It is admitted by the respondent that they are valid in all respects except that they were not each accompanied by a separate declaration of agency. But was a separate declaration of agency necessary when these four nomination papers were filed in a batch along with the declaration in question? We are of opinion that the declaration accompanied each and every one of the nomination papers (nos. 5-8). "To accompany" means to go in company with or to co-exist. One person or thing can accompany or co-exist with several other persons or things. If ten things are kept in a box, each co-exists with the rest. If A accompanies four persons going out for a walk, he accompanies not only the whole batch of four persons taken collectively but also each and every person in that batch. In our opinion, the returning officer has placed an unduly narrow construction on sub-rule (5) of rule 11. No doubt the last portion of that sub-rule says that no candidate shall be deemed to be duly nominated unless the declaration of agency "is delivered along with the nomination paper". But in the present case, the declaration of agency was delivered along with all the four nomination papers (nos. 5-8) presented together. We think that what sub-rule (5) contemplates is that every delivery of a nomination paper or papers by or on behalf of a candidate for election should be accompanied by a declaration of agency. For example, if four pairs of voters (one in each pair acting as proposer and the other as seconder) deliver four nomination papers nominating a certain person as a candidate for election, each one of such nomination papers must be accompanied by a separate declaration of agency, as the delivery in each case is separate; for sub-rule (3) of the rule 11 says that a nomination paper can be filed by a candidate in person, or by his proposer and seconder together. The delivery, by each set of proposer and seconder is a separate delivery, though several such sets of proposers and seconders may simultaneously file nomination papers before the returning officer. But there is nothing to prevent a

candidate from filing several nomination papers in a batch. The delivery in such a case is a single delivery and if one declaration of agency is filed along with the batch, it forms an accompaniment to each and every paper in that batch. The returning officer was therefore wrong in holding that none of the four nomination papers bearing serial nos. 5-8 was accompanied by a declaration of agency and in rejecting those papers on that ground. He should have held that every one of those nomination papers was valid and should have included the name of the petitioner in the list of validly nominated candidates and ordered a poll.

In view of the above finding, it is unnecessary to discuss the validity or otherwise of nomination papers nos. 9 and 10 which were subsequently filed by the petitioner. For even assuming that they were invalid, they did not and could not vitiate the previously filed nomination papers nos. 5-8 which were in all respects valid. In Parker's Election Agent (3rd edition, page 242), it is observed "There is nothing to prevent different sets of electors nominating the same candidate in separate nomination papers, and a bad nomination cannot avoid a good nomination of the same person". (*Northcote vs. Pulsford*, L.R., 10 C.P. 476).

As we have held that both the petitioner and the respondent were duly nominated, we beg to report to His Excellency the Governor that Rao Bahadur D. Laxminarayan, the candidate returned for the C.P. Commerce and Industry constituency, has not been duly elected. As regards costs, we are of opinion that as each candidate raised useless objections to the nomination of his rival candidate, each party should be ordered to bear his own costs.

ANNEXURE.

The preliminary point for determination is whether the electoral roll of the Commerce and Industry constituency as revised by the revising authority is not binding on the election Commissioners, and whether they can question the jurisdiction of the revising authority and go behind the electoral roll on the ground that the respondent had lodged no written claim before the said authority to have his name inserted in the preliminary roll, or on the ground that there was non-compliance with the C.P. electoral rules and regulations on the part of the said authority. On this point, we have heard the arguments of the learned pleaders on both sides and we now proceed to give our finding thereon and reasons for the same.

It is an admitted fact that in the preliminary roll for the Commerce and Industry constituency relating to the Nagpur district, the name of the respondent did not appear as an elector. It is also admitted that after the publication of the preliminary roll, the respondent did not lodge a written claim before the revising authority to have his name

inserted therein. It is further admitted that on the application of Radhesham Wahi, who is the managing director of the Pioneer Insurance Company, Ltd., Nagpur, the name of the respondent was by order of the revising authority inserted in the electoral roll. It is now contended on behalf of the petitioners that as no application was made by the respondent for insertion of his name in the electoral roll, the order passed by the revising authority on the application of Radhesham Wahi directing that the name of the respondent be substituted in place of Radhesham's name was made without jurisdiction and is consequently *ultra vires*. It is further urged that if this contention is accepted as sound, it follows that the respondent was not legally and validly registered as a voter for the Commerce and Industry constituency, that he was consequently not eligible for election as a member of the C.P. Legislative Council to represent that constituency and that his election should therefore be declared null and void. In support of this contention, reliance is placed on rule 9(1) of the C.P. electoral rules and regulation 6 of the regulations framed under rule 9(2) of the said rules.

It is contended by the respondent on the other hand that the order passed by the revising authority is final and binding on the election Commissioners under rule 9(3) of the electoral rules and sub-clause (3) of regulation 8 of the regulations framed under rule 9(2) of the said rules and that it is not open to us to go behind this order however wrong or illegal it may be.

The question for our consideration is which of these two contentions is sound. In considering this question, we have to remember that we are dealing with the roll of the Commerce and Industry constituency. That roll is before us. It gives in columns 2-6 the names of the several factories and companies in the Central Provinces coming within the purview of clauses (a) and (b) respectively of rule 10 of the second schedule attached to the C.P. electoral rules. These factories and companies are, so to say, the real electors, but as they are artificial persons and can act only through a natural person, the name of the person nominated or empowered by them to vote for them has been entered in the 7th, i.e. the last column of the electoral roll, the heading of which runs thus : " Name, father's name, age and address of person *qualified to vote on behalf of factory or company* ". We are concerned in this case with serial no. 44 of this roll prepared in English which relates to the Pioneer Insurance Company, Ltd., Nagpur. In the last column of this roll, as originally prepared (i.e. in the preliminary roll), the name of " Radhesham Wahi, Kamptee, age 42, managing director " was shown against serial no. 44. After the publication of this roll, Radhesham Wahi applied to the revising authority, viz. the District Judge, Nagpur, on the 17th July, 1926 for removal of his name from the roll and insertion of the name of Rao Bahadur D. Laxminarayan against serial no. 44.

That application is in the record of the revision case which is before us. In that application Radhesham alleged that he had by his letter, dated the 13th March, 1926, addressed to the Deputy Commissioner, Nagpur, requested him to insert the name of Rao Bahadur D. Laxminarayan (respondent), "who had been the chairman of the Nagpur Pioneer Insurance Company, Ltd., since its very inception as an elector in the Commerce and Industry constituency", and that in spite of that letter the Deputy Commissioner had wrongly inserted his (applicant's) name in the preliminary electoral roll against serial no. 44. He therefore prayed that his name be removed and that of the respondent substituted against serial no. 44. We do not know whether he made this application in his individual capacity or in his capacity as the managing director of the Pioneer Insurance Company, Ltd., Nagpur. But it is not disputed before us that he was the managing director of the Pioneer Insurance Company. That company which was the real elector, but which could not exercise its privilege of voting except through a natural person, duly authorized by it to vote on its behalf, had every interest in seeing that the name of the person authorized by it to vote on its behalf was entered in the last column of the electoral roll. It is therefore quite possible that the revising authority, viz. the District Judge, Nagpur, may have, after such enquiries as he made in the case, come to the conclusion that the application referred to above had been made to him by the company through its managing director to have the name of the person authorized by it to vote on its behalf substituted in place of the name of the applicant (Radhesham Wahi) and may have been, as a result of his enquiries, satisfied that the respondent and not Radhesham Wahi had been authorized by the company to vote on its behalf and may have accordingly ordered substitution of the respondent's name in place of Radhesham. We do not know what process of reasoning he adopted in passing the final order. It is, however, clear that he had an application before him which he could and may have treated as an application on behalf of the Pioneer Insurance Company and as he acted on this application, we are not prepared to hold that he acted without jurisdiction in passing the final order directing insertion of the respondent's name in place of Radhesham Wahi's name.

But it is urged that, to give the revising authority jurisdiction, it is necessary that the person whose name is not on the preliminary roll and who wishes to have his name inserted therein must apply, and that when such an application is before the revising authority then and then only that authority can order the insertion of that person's name in the electoral roll and not on the application of any other person. But can a person whose name appears on the electoral roll and who finds that his age or address has been wrongly given therein not apply to the revising authority to have the misdescription corrected? We do not doubt

for one moment that such an application can be made. The application in question made by Radhesham Wahi was obviously an application of this description. He found that the name of the company had been correctly stated against serial no. 44 in the electoral roll, but not the description of the person authorized by it to vote on its behalf, and therefore applied for correction of this misdescription, and the revising authority may have viewed his application in this light. It is therefore idle to urge that the revising authority acted without jurisdiction in ordering insertion of the name of the respondent in the electoral roll in place of Radhesham Wahi's name.

It is next urged on behalf of the petitioner that in dealing with the application made by Radhesham Wahi, the District Judge, Nagpur, did not follow the procedure laid down in clause 8(1) of the regulations framed under rule 9(2) of the C.P. electoral rules and that consequently, under rule 44 (1) (c) of the said rules, the election of the respondent should be declared void. Assuming, for the sake of argument, that the District Judge, Nagpur, did not follow the correct procedure in trying Radhesham Wahi's application, we are of opinion that any irregularities which he may have committed in the exercise of his jurisdiction are not by themselves sufficient to vacate the final order which he passed in the case. In the full bench case of *Hridyanath Roy vs. Ramchandra Barua* (24 C.W.N., 723) Mookerjee, Acting C. J., has observed :—

“Since jurisdiction is the power to hear and determine it does not depend either upon the regularity of the exercise of that power or upon the correctness of the decision pronounced, for the power to decide necessarily carries with it the power to decide wrongly as well as rightly. As an authority for this proposition, reference may be made to the celebrated dictum of Lord Hobhouse in *Malkarjun vs. Narhari* (25 Bom. 337 at page 347) ‘a court has jurisdiction to decide wrong as well as right; if he decides wrong, the wronged party can only take the course prescribed by law for setting matters right and if that course is not taken, the decision however wrong cannot be disturbed’. Lord Hobhouse then added that though the court had made a sad mistake in following the procedure adopted, still in so doing the court was exercising its jurisdiction and to treat such an error as destroying the jurisdiction of the court was calculated to introduce great confusion into the administration of the law. The view that jurisdiction is entirely independent of the manner of its exercise and involves the power to decide either way upon the facts presented to the court is manifestly well founded on principle and has been recognized and adopted elsewhere.”

From the above remarks it is perfectly clear that where an officer has jurisdiction to decide a certain matter, the contravention of certain rules framed in regulating his procedure in the exercise of his jurisdiction does not affect his jurisdiction and nullify his order. We have already held that the District Judge, Nagpur, had jurisdiction in the matter presented before him, and we are of opinion that even if in exercising his jurisdiction he committed certain irregularities, they do not afford any justification for ignoring his order and declaring it null and void.

Moreover, sub-clause (3) of regulation 8 of the regulations framed under rule 9(2) of the C.P. electoral rules says : " The revising authority after hearing the evidence, if any, adduced on behalf of the parties and after such further enquiry as he may deem necessary, shall pass orders on the claim or objection and *such order shall be final.*" Similarly, rule 9(3) of the said rules says : " The orders made by the revising authority *shall be final* and the electoral roll *shall* be amended in accordance therewith and *shall*, as so amended, be republished in such manner as the Local Government may prescribe." Sub-rule (4) says that the electoral roll shall come into force from the date of such republication and *shall continue in force for a period of three years.* Now what is the meaning of saying that the orders of the revising authority are final and that the electoral roll as finally prepared and republished shall remain in force for three years from the date of its final publication ? Can the election Commissioners go behind the orders of the revising authority and the entries in the final electoral roll ? We are of opinion that it is not open to the election Commissioners to go behind the orders of the revising authority or the entries in the final electoral roll as amended in accordance therewith. In *Stowe vs. Joliffe* (9 L.R.C.P. 734) it has been held that the register (electoral roll) is conclusive not only on the returning officer, but also on every tribunal which has to enquire into elections, except only in the case of persons prohibited from voting by any statute or by the common law of Parliament, i.e. persons who from some inherent or for the time immoveable quality in themselves have not, either by prohibition of statutes or at common law, the status of parliamentary electors, such as peers, women, persons holding certain offices or employments under the Crown, persons convicted of crimes which disqualify or the like. This case has been followed in the *Pembroke Boroughs* case (5 O'M. & H., 135) where Mr. Justice Darling has observed (at pages 137 and 138) :—

" And when you say that the register is conclusive, as has often been said, what you mean is this, that it is conclusive that the people who are on it have the qualification which entitles them to be there It may be that their names ought not to have been there but they were there at the time of this election, and I think they cannot be said to have been

less a part of the register than the names of any other persons who may be on the register without a qualification."

Similarly Mr. Justice Channell has observed in that case (*vide* page 144) :—

"When it is said that the register is to be conclusive what is meant is that the errors in it must stand. If it were always absolutely correct, there could be no importance in saying that it was to be conclusive. It seems to me that the policy of the legislature has, from the time of the Reform Act of 1832, until the Ballot Act, been to make it necessary to raise all questions as to rights to vote in the registration court and to do this by preventing their being raised at any other time or in any other manner." (*Cf.* also Parker's Election Agent, 3rd edition, page 242, and Rogers on Elections, vol. II, 15th edition, page 248.)

The same view has been taken in the Indian election petition cases. We accordingly hold that the order of the revising authority directing the insertion of the respondent's name in place of Radhesham Wahi's name is final and binding on us, and that we have no power to question its correctness or legality or the legality or correctness of the entry made in accordance therewith in the republished electoral roll.

We are also of opinion that the provisions of rule 44 (1) (c) of the C.P. electoral rules on which considerable stress was laid on behalf of the petitioners during the course of the arguments do not override, but are subject to the definite provisions of rule 9(3) of the said rules which lay down that the orders of the revising authority are final. In this connection, the following observations made in the *North Bhagalpur* election petition case (see page 165) may be cited with advantage :—

"Rule 42 (corresponding to rule 44 of the C.P. electoral rules) no doubt provides *inter alia* that if in the opinion of the Commissioners the result of the election has been materially affected by any non-compliance with the provisions of the Act or the rules and regulations made thereunder, the election of the returned candidate shall be void. But the jurisdiction thereby granted is necessarily limited by the definite provisions of rule 9(3) regarding the finality of the order of the revising officer, and we are satisfied that under this rule we are precluded from enquiring into the question of the respondent's possession of the necessary qualifications as a voter. We are confirmed in this view by the conviction that the legislature cannot have contemplated the provision of the cumbrous and elaborate procedure of an election Commission to determine simple questions of fact concerning the possession of such qualifications."

We agree with the above observations and hold that we are bound by the order of the revising authority.

Finally it was urged by Sir Moropant Joshi during the course of the arguments that it was open to him to show that the respondent had not been appointed by the Pioneer Insurance Company, Nagpur, to vote on its behalf, as the appointment of a person by a company to vote on its behalf amounted to a personal qualification, the absence of which could be proved in the case of an elector, notwithstanding the order of the revising authority directing the insertion of the name of such elector in the electoral roll or the entry of such person's name in the roll. We do not agree with this contention. It is no doubt true that the statutory disability of a voter may be proved notwithstanding the entry of that voter's name in the electoral roll (*Stowe vs. Joliffe*, 9 L.R.C.P. 734). But we are not dealing at this stage with the question of the respondent's statutory disability. The question now before us is whether he possessed the qualifications necessary for being brought on the electoral roll of the Commerce and Industry constituency. The statutory disabilities of a candidate standing for election and of a voter are specified in rules 5 and 7 respectively of the C.P. electoral rules, and the qualifications which a person must possess before his name can be brought on the electoral roll are given in schedule II attached to the C.P. electoral rules. In clause 10 of this schedule, the qualifications necessary for a voter in the Commerce and Industry constituency are specified. As to the possession of these and other qualifications mentioned in schedule II referred to above, the entry in the electoral roll is final and conclusive, though it does not entitle any one to vote who is suffering under a statutory disability. As pointed out by Mr. Justice Channell in the *Pembroke Boroughs* case (5 O'M. & H., 135 at page 142) :—

“ It seems to me that case (i.e. *Stowe vs. Joliffe*, 9 L.R.C.P. 734) comes to this : The register is made conclusive as to qualification, but this does not entitle any one to vote who is by statute or the common law of Parliament prohibited from voting even when qualified. The prohibition must be something personal to themselves as said in the judgment, *not a matter going only to their qualification.*”

We therefore hold that the electoral roll is conclusive that the persons who are on it have the qualification which entitles them to be there.

Our finding accordingly on the preliminary issue is that the electoral roll of the Commerce and Industry constituency, as revised in accordance with the order of the revising authority, is binding on the election Commissioners, and that they cannot go behind it and question the legality or the correctness of the entries made therein.

CASE No. XXXVI

Central Provinces (M.R.) 1927

(LEGISLATIVE ASSEMBLY.)

MR. ABDUL QADIR SIDDIQI *Petitioner,*

versus

SYED ABUL HASAN NATIQUE *Respondent.*

It is not necessary, or proper, to make the Local Government or the returning officer a respondent to an election petition. The latter when determining objections to a nomination paper is performing a judicial function. He can only be joined as respondent if there is an imputation of misconduct, as distinct from an erroneous decision on a point of law.

The withdrawal of his deposit by a candidate is no bar to the presentation and prosecution of an election petition. Nor by such withdrawal does the candidate acquiesce in the decision of the returning officer.

One declaration appointing an election agent can be treated as an accompaniment to several nomination papers.

THE petitioner was nominated by means of four nomination papers. On the date of the scrutiny, the returning officer rejected all these four nomination papers as invalid on the ground that they did not comply with the provisions of rule 11(5) of the Legislative Assembly electoral rules. The result was that the respondent who was the only validly nominated candidate was declared duly elected as a member of the Indian Legislative Assembly under rule 14(2) of the aforesaid rules. The petitioner has challenged the correctness of this decision by presenting this election petition.

The respondent raised two preliminary objections. His first contention was that an election petition could be made on one ground only, viz. corrupt practice as defined in chapter IX-A of the Indian Penal Code, and he urged that as there was no allegation of corrupt practice on his party in the present petition, it was liable to be summarily dismissed. His next contention was that the decision given by the returning officer about the validity or otherwise of the nomination papers at the time of the scrutiny was final, and that the election Commissioners could not go behind it and review it. Both these contentions were futile and untenable and the learned pleader for the respondent gave them up during the course of the arguments.

It was urged on behalf of the respondent that the chief secretary to the Local Government (who was the returning officer in this case) or the Local Government on whose behalf he was acting as a returning officer was a necessary party to this petition, and that as neither of them had been impleaded as a party and as the time for joining them as a party had expired, the petition was liable to be summarily dismissed. It was further urged that as the petitioner had withdrawn his deposit of Rs. 500 after the rejection of his nomination papers, he had ceased to be a candidate from the moment of such withdrawal, and that he was consequently not competent to make an election petition complaining against the rejection of his nomination. It was also contended that the petitioner, by withdrawing the deposit, had accepted the decision of the returning officer rejecting his nomination, and that he was therefore estopped from challenging the correctness of that decision. Lastly, it was urged that the order of the returning officer rejecting the nomination papers of the petitioner was perfectly correct as the petitioner had failed to comply with the provisions of rule 11(5) of the Legislative Assembly electoral rules by not filing a separate declaration of agency along with each of the four nomination papers presented by him.

Rule 32(1) of the Legislative Assembly electoral rules goes to show that an election petition is directed against a returned candidate. The primary object of the petitioner, whether he is a defeated candidate or a voter in the constituency, in filing such a petition is to unseat the returned

candidate. He claims relief against nobody else except the returned candidate and it therefore follows that the only person who can be joined as a respondent is the candidate whose return or election is complained of in the election petition. No doubt rule 34 provides that where the petitioner, in addition to calling in question the election, claims a declaration that he himself or any other candidate has been duly elected, he shall join as respondents to this petition all other candidates who were nominated at the election. But in this case the petitioner does not claim a seat for himself, and the only person besides himself who was nominated as a candidate for the Central Provinces Muhammadan constituency was the respondent. Consequently, under the Legislative Assembly electoral rules, it was neither necessary nor proper for him to make either the Local Government or the returning officer respondent to this petition.

In the *Rohtak* case it has been observed that there is no provision in the Indian, as there is in the English, law for the returning officer being made a respondent in an election case; and we should like to add that there is no provision either in the English law, or in the Indian law, for the Government being joined as a respondent to an election petition. In fact, the learned pleader who argued this case on behalf of the respondent did not, during the course of his arguments, urge that the Local Government should have been joined as a respondent. What he, however, urged was that as the returning officer had *suo motu* given a decision against the petitioner, the petitioner should have made him a respondent. If this contention is accepted as sound, every Judge who decides a case against a litigant would be a necessary party to an appeal against his decree or order. But it is urged that, while a Judge is a judicial officer, a returning officer is not and is therefore a necessary party to an election petition which challenges the correctness of his order passed on the scrutiny of nomination papers. There is no substance in this contention. A returning officer is neither a purely ministerial officer nor a purely judicial officer. He partakes of both characters; for some purposes, such as giving notices, providing polling stations, etc. he is merely a ministerial officer; for others, such as determining objections to nomination papers and ballot-papers, he is a judicial officer (Parker's Election Agent, 3rd edition, page 61). Therefore, even according to the English law, under which it is necessary to make the returning officer a respondent in certain cases, there must be an imputation of misconduct to justify his being made a respondent, and it has been held that a *bonâ fide* though erroneous decision upon a point of law, e.g. upon the validity of a nomination paper, is not a complaint of misconduct so as to justify his being joined as a respondent (*ibid.*, page 679). We accordingly overrule the contention of the respondent and hold that the returning officer was not a necessary party in this case.

The questions raised are : (1) whether the petitioner ceased to be a candidate when he withdrew his deposit and is therefore incompetent to prosecute this petition, and (2) whether by withdrawing the deposit he has submitted to the decision of the returning officer and is now estopped from challenging its correctness. With reference to the first question, we may observe that there is no provision in the electoral rules to the effect that a candidate ceases to be a candidate as soon as he withdraws his deposit after his nomination is refused. On the contrary, rule 30(b) of the Legislative Assembly electoral rules says that "candidate" means a person who has been nominated as a candidate at an election, or who claims that he has been so nominated or that his nomination has been improperly refused. The petitioner clearly comes within this definition as he claims that he was duly nominated and that his nomination was improperly refused by the returning officer. He had therefore every right to present this petition under rule 32, and the fact that he withdrew his deposit is no bar to his prosecuting it. Moreover, under rule 32 an election petition may be filed by any candidate or by an elector. The petitioner is admittedly an elector on the roll of the Central Provinces Muhammadan constituency, and even assuming for the sake of argument that he ceased to be a candidate by withdrawing his deposit, he did not surely cease to be an elector, and there is nothing in the rules to prevent us from treating his petition as having been made in that capacity. We therefore overrule the first contention.

The next question is whether the petitioner by withdrawing his deposit has acquiesced in the decision of the returning officer and is estopped from challenging its correctness. In our opinion, no question of acquiescence or estoppel arises in this case. In the first place, there can be no acquiescence when there is no option. Rule 12(2) of the Legislative Assembly electoral rules says that if the nomination of a candidate is refused, his deposit *shall be returned to him*. Under this rule, the returning officer after rejecting the nomination of the petitioner called upon him to take back the deposit and the petitioner had to obey the returning officer. We fail to see how by accepting the deposit under these circumstances, he can be regarded as having acquiesced in the order of the returning officer rejecting his nomination.

In *Govinda Ramanuj Das vs. Ramcharan Das* (I.L.R. 52 Cal. 748 at 763), Page, J., has observed :—

"Further, it must be borne in mind that estoppel by acquiescence connotes among other things that the person estopped in effect has represented to the person who is infringing his right that he is not entitled to complain that his right is being invaded ; and that the party relying upon this representation has altered his position to his detriment under a mistaken

impression that he was legally justified in acting as he had done."

In the present case, nobody infringed the right of the petitioner. The returning officer has bound to return the security deposit to him and he was entitled to receive it after his nomination was refused. He made no representation to anybody that he would not dispute the decision of the returning officer, nor did the respondent alter his position to his detriment after the deposit was paid back to the petitioner. That being so, it is idle to contend that the acceptance of the deposit by the petitioner estops him from prosecuting this petition. In *Midnapore South*¹ case, the pleas covered by issue no. 2 were raised and overruled. We agree with the view taken in that case and hold that the petitioner had a right to make this petition, notwithstanding the fact that he accepted the security deposit and that he is in no way estopped from prosecuting it.

It appears that on the 20th of October, 1926 the petitioner filed four nomination papers and along with them, and not attached to any one of them, he filed a declaration appointing himself as his election agent for the election. On the following day, i.e. on the 21st October, 1926, which was the date fixed for the scrutiny of nomination papers, the returning officer rejected all these four nomination papers on the ground that the petitioner had failed to comply with the provisions of rule 11(5) of the Legislative Assembly electoral rules. In doing so, he observed :—

"Rule 11(5) requires that each nomination paper shall be accompanied by a declaration regarding the election agent of the candidate. In the present case, had the single declaration which was received been attached in any way to any one of the nomination forms, there would have been a compliance with rule 11(5) as regards that particular nomination form. As the declaration was not attached to any nomination form but all were loose, it cannot be said to which nomination (form ?) the declaration pertained. I must therefore hold that Mr. Siddiqi owing to this failure to comply with rule 11(5) of the rules has not been duly nominated and I reject his nomination."

The question now is whether the interpretation put upon rule 11(5) by the returning officer is correct. We had occasion to interpret this rule in the election case *Central Provinces Commerce and Industry* (see page 283). In that report we have given our reasons for holding that the view taken by the returning officer is not correct. We had the advantage of hearing a very elaborate argument on the point from the learned pleader for the respondent in this case. After giving our most careful

¹ I.E.P. II. 187.

consideration to the several points urged by him in his argument, we have come to the conclusion that the view already taken by us as to the interpretation to be put upon rule 11(5) is sound and we see no reason to alter it.

When the petitioner filed four nomination papers and along with them a loose declaration of agency before the returning officer, there can be no doubt that his intention was that the declaration should be treated as an accompaniment to all the four nomination papers presented together. This is admitted by the respondent in his written statement, but he urges that though the declaration accompanied *all* the nomination papers it did not accompany "every or each nomination paper as required by rule 11(5)". To admit that a declaration accompanies all the nomination papers, and at the same time to urge that it does not accompany every one of those nomination papers is in our opinion a contradiction in terms. We do not think there is any incongruity in a declaration being an accompaniment of all and every one of the nomination papers filed along with that declaration. Accompaniment does not, in our opinion, convey any idea of exclusive appropriation of the thing accompanying to one thing only. One thing can go in company with and form an accompaniment to several things taken separately. What the learned pleader for the respondent wants us to do in order to justify his construction is to read the word "separate" before the word "declaration" occurring in the second line of rule 11(5). We do not think we can add any word to or take away any word from the language of a statute for the purpose of putting upon it a meaning which it does not itself convey but which is sought to be put upon it by the respondent. In Maxwell, on the Interpretation of Statutes (6th edition, page 25) it has been observed that nothing is to be added to or to be taken away from a statute unless there are adequate grounds to justify the inference that the legislature intended something which it omitted to express. No adequate grounds have been urged in the present case to justify any such inference, and we therefore think that it would be a wrong thing to read the word "separate" before the word "declaration" when the legislature has deliberately omitted to use that word.

Moreover, we are of opinion that if two constructions of sub-rule (5), rule 11 are possible, the petitioner who, relying on one construction, filed his nomination papers in a batch along with one declaration, cannot be said to have acted in contravention of the said sub-rule. Besides, we hold that the construction which the petitioner has put on rule 11(5) is more reasonable and equitable and harmonises better with the intention of the legislature. In this connection, we should like to point out that the object of the legislature in insisting on the filing of a declaration of agency by a candidate for election is obviously to enable it "to allocate definite responsibility for the conduct of the election, especially with a

view to the prevention of any corrupt practices" (Hammond's Indian Candidate, page 40), and that object is surely accomplished when a candidate files one declaration of agency along with the nomination papers filed by him in a batch. Where is the necessity or propriety of requiring a separate declaration of agency along with each nomination paper in such a case when a single declaration filed along with the nomination papers presented together would fully accomplish the object which the legislature has in view? It may be said that probably the legislature intended that the record of every nomination paper should be complete in itself so that the returning officer may not have to refer to the record of any other nomination paper to adjudge its validity. But a reference to other nomination papers would be unavoidable in case an objection to the validity of a nomination paper is taken under 11(4) read with regulation 4 (2) (B) of the regulations framed under rule 15 (*vide* page 68 of the Legislative Assembly electoral rules and regulations), and there is consequently no substance in the aforesaid contention.

In this connection we may also point out that under the old Legislative Assembly electoral rules which were in force in 1920 it was enough for a candidate to file a declaration of agency on or before the date fixed for the nomination of candidates and it was not necessary for him to file it along with his nomination paper or papers. That rule has been replaced by rule 11(5) of the new rules which requires that every nomination paper delivered under sub-rule (3) of rule 11 shall be accompanied by a declaration of agency and that no candidate shall be deemed to be duly nominated unless such declaration is delivered along with the nomination paper. We do not know why this new sub-rule was substituted for the corresponding old rule. But this new sub-rule (5) read with sub-rule (3) of rule 11 appears to show that it was primarily intended to provide for the case of "a nomination paper" (i.e. a single nomination paper) filed by or on behalf of a candidate and was not, it would seem, intended to cover the case of more nomination papers than one filed by him or on his behalf. In other words, the expressions "every nomination paper", and "the nomination paper" occurring in sub-rule (5) were intended to refer to "a nomination paper" filed by or on behalf of each individual candidate and not to every one of the several nomination papers filed by him or on his behalf. If this view is correct, the only reasonable way to interpret sub-rule (5) so as to make it applicable also to cases in which more nomination papers than one are filed by or on behalf of a candidate, is to hold that each separate delivery of a nomination paper or papers should be accompanied by a declaration of agency. Any other interpretation of the rule would cause unnecessary hardship. We accordingly hold that having due regard to the history of rule 11(5) and the intention of the legislature in requiring a declaration of agency from a candidate for election, we shall not be justified in

interpreting rule 11(5) to mean that where a candidate files a number of nomination papers together, he must file along with them as many declarations of agency as there are nomination papers.

As it is admitted that the nomination papers filed by the petitioner are valid in every other respect except in respect of complying with the provisions of rule 11(5) and as we have held that there was no failure in complying with rule 11(5), we hold that the petitioner was duly nominated and that the returning officer was wrong in rejecting his nomination and in declaring the respondent duly elected under 14(2).

CASE No. XXXVII

Champaran North (N.-M.R.) 1924,

(BIHAR AND ORISSA LEGISLATIVE COUNCIL.)

UPADHYAY AMBIKA PRASHAD *Petitioner,*

versus

LAKSHMI MOHAN MISRA } *Respondents.*
RAI SAHIB RAM GOPAL SINGH CHAUDHURY .. }

It is a material irregularity to mark the electoral roll number of voters on the back of each ballot-paper, as tending to the identification of the voter. Where a substantial portion of the electors have been prevented effectively from recording their votes the election is void.

THE contesting respondent Babu Lakshmi Mohan Misra who was a candidate for the North Champaran non-Muhammadan rural constituency polled 843 votes and was declared to have been duly elected ; the petitioner Babu Ambika Prashad Upadhyay polled 721 votes and the third candidate Chaudhury, Ram Gopal Singh, Rai Bahadur, polled 167 votes.

The petitioner asks for a scrutiny and claims the seat on the ground that 212 votes recorded at the Bettiah polling station and 149 votes recorded at the Lauriya polling station on behalf of Babu Lakshmi Mohan Misra were improperly accepted by the presiding officer and that there was a material irregularity in conducting the election. It appears that at both these polling stations the electoral roll number of the voter was marked on the back of each ballot-paper and that it was thus possible for the persons engaged in the counting to ascertain the identity of the voter. The number of marked ballot-papers found in the box of the petitioner was 77 at Bettiah and 40 at Lauriya.

If these marked ballot-papers had been rejected the number of votes received by Babu Lakshmi Mohan Misra would have been reduced from 843 to 482 and those received by Babu Ambika Prashad would have been reduced from 721 to 604. It was urged by the petitioner before the returning officer that the marked papers should be rejected and that he should be declared to have been duly elected.

The returning officer by his order, dated the 4th December, 1923, rejected the objection in the following words : " After the counting the ballot-papers will be mixed up with the ballot-papers of other polling stations so that no one will be able to identify the voters of Bettiah and Lauriya, unless he knows what are the official marks distinguishing the ballot-papers of these two stations or unless he has access to the ballot-paper lists, and as the stamps and the lists are kept strictly confidential it is impossible for the voter to be identified." It may be that identification could not be made by reference to the ballot-paper lists (though this is not at all clear from the regulations) by any one except the presiding officer ; but it is by no means shown that those who were engaged in the counting could not from the electoral roll numbers appearing on these defective ballot-papers have ascertained who the voters were. The secrecy of the ballot was therefore violated, and the first question is whether it has affected the result of the election. The answer to this is clearly in the affirmative.

The next question is whether the election should be declared void or whether upon a scrutiny and after rejecting the challenged votes petitioner should be declared to have been elected. As has been observed by Hammond in " The Indian Candidate and Returning Officer " at page 173, a scrutiny should be allowed only in cases where the margin is small ;

but where a substantial portion of the electors have been prevented from recording their votes effectively owing to a breach of the law we think it would be wrong to allow the election to stand. Here no less than 515 persons out of a total of 1,731 were prevented from effectively recording their votes and the rule laid down in *Warrington's* case (I. O'Malley and Hardcastle, 42) cannot be applied. A very substantial proportion of the voters have been prevented from voting effectively through the fault of the presiding officer and the election should, in our opinion, be declared void. The law on the subject has been fully discussed in *Woodward vs. Sarsons*, a full report of which is given at page 342 of "The Indian Candidate and Returning Officer".

It is contended by the petitioner that if the result of the scrutiny is to unseat the contesting respondent, it is not open to the latter to object to the petitioner's being returned as he has filed no recriminatory petition. In the view we take of the case the question does not arise. The election being no election in law it is void.

The result is that we declare that the returned candidate has not been duly elected and that the election is void. The petitioner is entitled to the costs of this hearing which we assess at Rs. 80 and we recommend that the amount be recovered by him from the contesting respondent.

CASE No. XXXVIII
Chingleput (N.-M.R.) 1924
(MADRAS LEGISLATIVE COUNCIL.)

K. V. KRISHNASWAMI NAYAKAR *Petitioner,*

versus

(1) A. RAMASWAMI MUDALIYAR }
(2) C. MUTHIAH MUDALIYAR } *Respondents.*

Grounds which will justify a recount discussed.

Procedure to be observed during the counting of votes, and number of agents to be allowed to be present.

Canvassing by members of *taluk* boards and by teachers of local board schools does not amount to undue influence of such a degree as would vitiate the election.

Evidence of bribery should not fall short of the standard required to prove any criminal charge.

FIRST, the petitioner claims a general recount and scrutiny of the votes. It is well settled law that no candidate is, as a matter of right, entitled to such a recount or scrutiny merely for the asking. It is a matter of discretion for the court, and the petitioner has to make out and prove specific grounds which will satisfy the court that the return was not accurate, and that recount and scrutiny are called for in the interests of justice. The petitioner has pressed before us on this part of his case four grounds :—

- (1) that the returning officer had not received all the forms no. VI along with the ballot-boxes and therefore could not have checked the papers in some of the ballot-boxes with the figures entered in form no. VI by the presiding officer ;
- (2) that, in several instances, the total number of figures actually found in the ballot-boxes did not correspond with the totals entered in the form no. VI by the presiding officers ;
- (3) that no reasonable opportunity was allowed to the candidates to examine the rejected ballot-papers and state their objections to the returning officer, or to see the ballot-papers generally and state their objections to the votes ;
- (4) that the returning officer left it to the counting clerk to decide which votes were so doubtful as to require the decision of the returning officer on their validity.

As to the first point, from the evidence of P.W. 20, it appears to be true that certain forms no. VI were received after the ballot-boxes had been opened. But column 2 in register, exhibit C, was in these cases filled up from form no. VII, in which are reproduced for his own division by each divisional officer, the figures in column 3 of the form no. VI received from the various polling stations in his division. In cases where form no. VI had not been received, the number of papers in the ballot-boxes was checked with the figures in form no. VII. All the forms no. VI are now before us and we are not pointed to any instance in which the figure of any form no. VI does not correspond to the figure entered in column 2 of register, exhibit C. We therefore find no force in this objection. °

As to the second point, it appears from a comparison of columns 2 and 3 in exhibit C, that in several instances the totals found in the ballot-boxes differed by one or two papers from the number entered in form no. VI. In only one case—form no. VI, serial no. 45—the difference is large, namely 13. But there is nothing to suggest that we should give a sinister interpretation to this difference. There is absolutely no evidence on which to base any inference that the ballot-box was tampered with. Under the rules, it was open to the candidates or their agents to put their own seals on the ballot-box before it left the polling office.

No one has come forward to say whether the petitioner's agent put any seal or not. No complaint that the seals of any box were tampered with was made to the returning officer, nor was any suggestion of the sort put forward before us in the examination of the petitioner's witnesses. We reject the suggestion that any box had been tampered with. The difference of figures in this case in our consideration may be due to inaccurate counting by the presiding officer or to votes for the Legislative Assembly having been put in the Legislative Council boxes. The returning officer signed exhibit C in token of its correctness and he has not been examined to elicit how this difference in number had occurred. Even if we allow thirteen more votes to the petitioner, that will have no effect upon the result of the election. We find here no ground for a recount.

As to the third point, what candidates and their agents are entitled to at the time of the counting, is laid down in regulation 46. They have two privileges: (i) after preliminary checking of the number of votes in the ballot-boxes with form no. VI, and the distribution of votes to the counting clerks, they should have reasonable opportunity to inspect without handling the ballot-papers; (ii) when the returning officer has rejected a ballot-paper as invalid, a candidate or his agent may question the correctness of the order, and then the returning officer should record his reasons for rejection. The petitioner's general complaint is that as the votes were counted by ten sets of clerks at the same time and as the rejection of votes by the returning officer was going on also at the same time, and as he was allowed only one agent it cannot be said that he had reasonable opportunity to inspect either the counting process or the rejection process, or both. This complaint is voiced by his agent, P.W. 29, who admits that he does not know the regulations and never attempted to acquaint himself with them. The petitioner seems to claim that the votes must be counted one by one by the returning officer himself, each vote being shown to the candidates before it is counted or rejected, and they being allowed to state the objection, if any, to its being counted. But we are quite sure that this is not the intention of the regulations; otherwise the power given to the returning officer to appoint assistants in counting the votes and to reject votes without the candidates being entitled to show cause against rejection, would be meaningless. All that is intended is that the candidate or his agent should have a general opportunity to see for himself that the counting and rejection are proceeding on the right lines, and check them for himself from time to time to satisfy himself that the proper principles are being followed. Such inspection as is allowed to a candidate must be consistent with the regulations which lay down that the opportunity of inspection is available only during the time when the general counting by the assistants of the returning officer is going on and that each candidate shall be allowed only one agent for that inspection. It is in evidence that the only request

made to the returning officer in this case by the petitioner was that as there were ten sets of counting clerks, each candidate should be allowed to have ten agents to watch and check the counting. As there were five candidates, this would have meant no less than 55 outsiders in the room, and obviously it would have been impossible for the counting staff to keep an eye over such a body of people to see that no attempt was made to tamper with the ballot-papers. To allow such a number would have entailed a fresh influx of officials to keep an eye on them, and the request was rightly refused as impracticable, and we certainly are not prepared to hold that this refusal deprived candidates or their agents of that reasonable opportunity which the regulations allowed to them.

It is further in evidence from the statement of the petitioner's agent, P.W. 29, that the allegation that he did not have reasonable opportunity of inspecting and checking the votes is not correct. All the other four candidates and their agents presumably had the same opportunity. Nevertheless, no single instance has been alleged going to show that the inspection of any vote or any rejected paper was refused when demanded ; or that any objection to any rejected paper was not noted. The petitioner has not examined the returning officer, but when the Sub-Collector, P.W. 14, was examined, he gave it as his opinion that reasonable opportunity was given. In these circumstances, we are not prepared to hold that there has been any breach of the regulations in this matter.

As to the fourth point it is quite clear from the evidence that the clerks were instructed to put aside for the decision of the returning officer all votes which appeared in any way doubtful. It is a purely mechanical process, seeing whether a cross is well and truly opposite a candidate's name. The mechanical duty alone was entrusted to the clerks. If there was any deviation from correctness, the votes were put on one side as doubtful, for the decision of the returning officer. Regulation 46 (2) (b) permits the returning officer to appoint assistants to help in counting, which implies in itself a certain measure of delegation to these assistants. Their work was supervised by revenue divisional officers. We cannot say that in any real sense these clerks in performing the mechanical duty described, were usurping the quasi-judicial functions of the returning officer.

A point has been made on the statements of P.Ws. 14 and 29 that the majority in favour of the candidate, Ramaswami Mudaliyar, was talked about on the night of the counting as about 105, while at the official announcement on the afternoon on the next day his majority was announced as 410. Prosecution witness 29 admits that the returning officer himself never mentioned the figure 105. It appears to have been mentioned by some clerks. The returning officer is the best man to know the real facts in this matter, and the petitioner has not chosen to examine him. The said estimate may have referred only to the totals

made by the clerks without reference to the doubtful votes allowed by the returning officer himself. It is asserted that a petition asking the returning officer not to announce the result, because of this difference in figures, was presented just before he made the final announcement, and that the petition was returned by him. But it is not produced before us and we do not know what it contained. In these circumstances, we see no foundation for the inference that the figures announced were not correct. On the whole, we decide the petitioner has made out no case for a general recount or scrutiny of the votes.

* * * * *

Allegations of undue influence were also put forward. All that we find proved is a certain amount of canvassing by members of taluk boards and by teachers of local board schools. Such canvassing by these teachers may be against departmental instructions, but does not in our view amount to a circumstance which would vitiate the election. It might lead to the inference that some pressure was brought to bear on these teachers, but that any undue influence was exercised by them over voters, we do not find proved. Two witnesses P.Ws. 23 and 25, speak to a particular threat of removing a school unless the villagers voted for the respondents. Such evidence, if it was held to be reliable, would be evidence of some undue influence. But we do not find it in any way reliable. There is therefore no case for the respondent to answer on this count.

Specific allegations of bribery were made, and no doubt if any one specific instance of bribery by or on behalf of the returned candidate were proved, the election would have to be set aside. For this reason that the charge of bribery is a serious charge, in fact a criminal charge, we consider that the evidence requisite to prove it, should not fall short of evidence required to prove any criminal charge. Applying this test to the evidence of the witnesses, P.Ws. 1, 3, 19, 27, 29 and 31, who speak of definite acts of gifts of money, we are not satisfied that in any of these instances the allegation has been made good.

For purposes of rule 47 of the Madras electoral rules, we record a finding that no corrupt practice has been proved to have been committed by any candidate or his agent or with the connivance of any candidate or his agent, and that no person has been proved at this enquiry to have been guilty of any corrupt practice.

We therefore dismiss this petition. Respondent will get costs from petitioner, fixed by us in one sum at Rs. 1,600 (sixteen hundred).

CASE No. XXXIX

Chota Nagpur Division (M.R.) 1924

(BIHAR AND ORISSA LEGISLATIVE COUNCIL.)

KHWAJA HAKIM JAN *Petitioner,*

versus

MAULAVI SHAIKH MUHAMMAD HUSAIN .. *Respondent.*

The manager of a Court of Wards estate is an “official” within the meaning of section 80B of the Government of India Act, 1919, read with the rules prescribed under section 134 of the Act.

A returning officer should make a summary enquiry into the candidate’s eligibility at the time of scrutiny of the nomination paper.

THE petitioner was a candidate for election for the Chota Nagpur Division Muhammadan rural constituency of the Local Legislative Council at the last general election, and on the 5th November, 1923, at the scrutiny of the nomination papers in connection therewith an objection was made before the returning officer by the respondent that the petitioner was not eligible for nomination on the ground that he was an official within the meaning of section 80B of the Government of India Act of 1919. It was admitted that the petitioner was at the time of his nomination the manager of an estate under the management of the Court of Wards, and it was contended that the petitioner was an official within the meaning of the Act. The returning officer allowed the objection and rejecting the nomination paper of the petitioner he declared the respondent to be duly elected.

The petitioner now contends that the election is void, firstly on the ground that the nomination was valid, and, secondly on the ground that the returning officer had no jurisdiction to reject the nomination paper.

It is urged that a manager of Court of Wards estate is not an official as defined in rule 2 of the rules framed under section 134 of the Government of India Act : firstly, because he is not a Government servant, and, secondly, because he is not paid by salaries or fees out of the general revenues of the Government of India.

The expression "Government servant" is not defined in the Act, but there is not any difficulty as to its meaning. From section 1 of the Act it is clear that India is governed in the name of His Majesty the King-Emperor and that all rights which, if the Government of India Act of 1858 had not been passed, might have been exercised by the East India Company may be exercised by and in the name of His Majesty as rights incidental to the Government of India. The Government is carried on either directly through the Government of India or indirectly through the Local Government. According to the General Clauses Act of 1897, Government includes the Government of India and the Local Government. If the Court of Wards is subordinate to the Local Government then the petitioner being employed by the Court of Wards is clearly a Government servant.

It is contended that the Court of Wards is a statutory body independent of Government, but a reference to Bengal Act IX of 1879 from which statute the court derives its authority shows that this contention cannot be accepted. Section 5 of the statute enacts that the Board of Revenue shall be the Court of Wards. Section 3 provides that the court may delegate certain functions to Commissioners and Collectors. Section 69 enacts that in exercising its powers under the Act the court is to be guided by the advice and instructions of the Governor in Council.

Section 48 enacts that the manager shall be guided by the instructions of the court in the application of the moneys recovered by him subject to the special orders of the board as regards the order of priority in respect of certain heads of expenditure. Subject to the provision of the Act, the acts of the court are the acts of the Board of Revenue. Now, the Board of Revenue is nothing but a name for a body of civil servants under the Crown in India. A brief examination of the history of the legislation on the subject will make this clear.

The first Board of Revenue was established by the order of the Court of Directors of the East India Company in 1771. It consisted of the Governor and members of the Council and an Accountant-General with assistants and was located at Calcutta. That body was succeeded by a Committee of Revenue under whom there were Provincial Councils stationed at Burdwan, Murshidabad, Patna, Dinajpur and Dacca. In 1781 the Provincial Councils were abolished and their duties were transferred to the Committee of Revenue which had been reorganized and now consisted of four covenanted servants of the company. In 1786 this Committee of Revenue was abolished and a Board of Revenue was again established. This board consisted of a number of Government servants whose duties were superintendence and control over subordinate officers and rules for their guidance were incorporated in regulation II of 1793. By regulation III of 1822 three such Boards of Revenue for the Lower, Central and Western Provinces were respectively established, and the Board of Revenue for the Lower Provinces, within which fell the present province of Bihar and Orissa, consisted of such number of members as the Governor-General in Council might from time to time appoint. In 1829 by regulation I of that year, Commissioners were vested with the powers of the Board subject to certain modifications but were placed under the instructions and control of a Sadar or Chief Board of Revenue. Section 4 of that regulation prescribed that Commissioners and the Sadar Board were to be guided by the orders of the Governor-General in Council who was empowered to fix the stations at which they should reside when not employed on duties of circuit. By Act XLIV of 1850 the Board of Revenue in the customs, salt and the opium departments, which had been constituted by regulation 4 of 1819, was merged in the Sadar Board of Revenue which was henceforth to be styled as the Board of Revenue for the Lower Provinces of the Presidency at Fort William in Bengal. Finally upon the partition of Bengal in 1912 and the creation of the province of Bihar and Orissa, the legislature of this province passed Act I of 1913 constituting a Board of Revenue for Bihar and Orissa, and by section 5 of the Act all references to the Board of Revenue constituted under the Board of Revenue, regulation III of 1882 or the Bengal Revenue Commissioners, regulation I of 1829 or to the boards referred to in the Bengal Board of Revenue Act of 1850

were to be construed as reference to the board as reconstituted by the Bihar and Orissa Act.

Accordingly it seems clear that the members of the Board of Revenue have from the earliest times been the servants of Government.

Therefore it follows that the Court of Wards also is a body comprised of such servants.

Now section 39 of the Act confers power upon the court to appoint a manager to manage the property of the ward and section 41 empowers the court to pay the manager an allowance out of the property for his care and pains in the execution of his duties. The manager therefore is also a Government servant within the meaning of section 134 of the Government of India Act.

It is admitted that the manager is a whole-time officer and that he is paid by a salary, but it is contended that he is not an official as the salary does not come out of the revenues of India. The reply to this is that rule 2 of the non-official rules made under section 134 of the Government of India Act does not prescribe that the salary shall be paid out of the revenues of the Government of India. Even if it did so the manager would not fall within the rule, for there is nothing in the Court of Wards Act which precludes the Government in case of necessity from advancing money for the purpose of paying the manager and recouping itself from the income of the property. In such a case the manager could be said to be paid out of the general revenues and the rule even in its restricted sense would be applicable to him. But, in our opinion, rule 2 contains no implied restriction and prescribes that a Government servant shall be an official whenever he receives his salary from the hand of Government no matter from what source derived.

In the present case therefore the petitioner fulfils the conditions required by the rule. He is therefore an official.

Our attention has been drawn to the fact that in *Nazamuddin vs. Queen Empress* (I.L.R. 28, Calcutta 344) there were observations by a Division Bench of the Calcutta High Court that a Court of Wards manager was not a public servant within the meaning of section 21 of the Indian Penal Code, and it is suggested that section 59A of the Court of Wards Act was expressly enacted in order to meet the difficulty raised by these observations. It is not necessary for the purposes of this case to consider the correctness of the reasoning of the learned judges in the case above referred to, for it does not appear to be material to consider whether the manager would or would not be a public servant without the express provisions of section 59A. What is to be determined is whether he is a Government servant within the meaning of the Government of India Act?

An attempt has also been made to show that the income of the estate which is managed by the petitioner is a local fund within the

meaning of rule 9 (14) (a) of the Fundamental Rules framed under section 86B of the Government of India Act, and that as the petitioner is paid by such a fund he is at most a Government servant on foreign service and that it cannot properly be said that he receives any salary from Government. In our opinion the Fundamental Rule in question has no bearing upon the case ; the income of the estate is not a local fund and it is sufficient that the manager receives his salary from the hand of Government.

We find, therefore, that the petitioner being an official is not qualified for election to the Legislative Council.

The next question is whether it was competent to the returning officer to reject the nomination paper. Now rule 9 of the regulations framed by the Local Government under the election rules of 1920 (*vide* notification nos. 1737-R.T., dated the 29th July, 1920, and 2878-R.T., dated the 24th September, 1920) runs as follows : " The returning officer should decide objections to the nomination paper itself ; but he should not determine the question whether the candidate is duly qualified or not, or whether the candidate's age as stated in the nomination paper is correct or not."

The regulations applicable to the present case were published by notification no. 7331 in the *Bihar and Orissa Gazette Extraordinary*, dated the 19th October, 1923 and they purport to have been framed under the powers conferred by rule 15 of the rules framed by the Government of India and published by notification no. F-213-VIII, dated the 30th July, 1923, in the *Government of India Gazette*. These rules again purport to have been framed under sections 102A and 129 of the Government of India Act, and it is clear that the regulations of 1923 give wider powers to the returning officer. Clause I of regulation 24(4) empowers the returning officer, after summary inquiry to reject the nomination paper on the ground that the candidate is ineligible for election under rule 5 or 6. But neither of these rules prescribes that a person shall not be eligible for election because he is an official. They prescribe other grounds of ineligibility and the question is whether the returning officer was bound to disregard the provisions of section 80B of the Government of India Act and to accept the petitioner's nomination paper so long as he did not suffer from any of the disabilities specifically enumerated in rules 5 and 6. In our opinion the rules are neither exhaustive nor exclusive. It is true that rule 11 prescribes that a person may be nominated as a candidate for election if he is eligible for election under the rules. But the rules are framed under sections 72A and 129A of the Act and are therefore subject to the provisions of the Act. The petitioner would therefore not be eligible under rules 5 and 6 if he was already disqualified under section 80B. It follows that the returning officer acting under regulation 24 was bound to take notice of the

disqualification of the petitioner by reason of his being an official. His nomination paper was therefore rightly rejected.

In this view of the case it is unnecessary to consider in any detail the law in England. Generally speaking, it may be said that in England the only duty of the returning officer is to decide objections to the nomination paper itself. He has no jurisdiction to determine such a question as the qualification of a candidate which can only be determined by an election petition, and it would seem that rule 9 of the rules of 1920 to which reference has already been made was intended to follow the English practice. But in a municipal election case decided upon the provisions of the Municipal Corporations Act of 1822 in England it was held that the returning officer should reject any nomination paper which is on the face of it a mere abuse of the right of nomination or an obvious unreality, as for instance, if it purports to nominate a deceased Sovereign : *Harford vs. Lynskey* (1899), 1 Q.B. 852. In our opinion these principles also apply in India and the rules and regulations of 1923 give effect thereto.

Finally it was contended on behalf of the petitioner that the returning officer's proper duty was to accept the nomination and to leave it to an aggrieved party to raise the question of the petitioner's ineligibility by an election petition in the event of his being elected and it was also suggested that the petitioner might have freed himself from his disability by resigning his post before being declared to be elected. In the view which we take the point does not arise but it is of interest to note that in *Harford vs. Lynskey* above referred to a doubt was expressed as to whether a minor who attained his majority between the nomination and the poll would be disqualified. In the case before us the law speaks with a clearer voice. In our opinion rule 11 requires that a person must be qualified to be elected as a member of the Council at the moment when he offers himself for nomination. If there is any ground of disqualification the returning officer cannot accept his nomination on the chance that the disqualification may be removed before the election is completed. Election includes nomination which is one of the processes necessary to complete it, and it is reasonable that eligibility for election should be the measure of eligibility for nomination. In our opinion regulation 24 requires the returning officer to make a summary enquiry into the candidate's eligibility under rules 5 and 6 read with section 80B of the Act.

The result therefore is that the petition fails and our decision is that a report be submitted by the president to the Local Government that the respondent, the returned candidate, has been duly elected. We further recommend that the costs of this inquiry which we assess at Rs. 160 be paid by the petitioner to the respondent.

CASE No. XL

Dacca City (N.M.) 1924

(BENGAL LEGISLATIVE COUNCIL.)

SHYAM CHAND *Petitioner,*

versus

RAI BAHADUR PYARI LAL DAS, M.B.E.	..	..	<i>Respondent no. 1.</i>
DHIRENDRA CHANDRA RAY	..	..	2.
SATISH CHANDRA SARKAR	..	..	3.

It is not necessary to maintain the secrecy of the official marks on ballot-papers, when there is an enquiry into the election based on an election petition.

Substantial compliance with the electoral regulations is sufficient. In order to void an election any irregularity must be of such a kind as “materially to affect the result of the election”.

THE petitioner alleged certain corrupt practices and non-compliance with certain regulations in the Bengal electoral regulations.

Apart from the evidence as to corrupt practices which was discussed at great length the Commissioners made the following observations as to procedure and non-compliance with electoral regulations :—

“ On the 11th of April last, when we sat for the first time to settle the points for determination, the petitioner had presented a petition, alleging three more instances of corrupt practices on behalf of the respondent no. 1. We, however, declined to entertain that petition as having regard to the period of limitation prescribed under rule 32 (1) (a) of the Bengal electoral rules, the above petition was time-barred.

“ Another matter relates to the prayer made by respondent no. 2 in his written statement, claiming the seat for himself, in case both the respondent no. 1 and the petitioner were declared unsuccessful. We declined to entertain this prayer, having regard to the proviso to rule 42 (1) of the Bengal electoral rules, which had not been complied with.

“ There were also certain recriminating allegations in paragraph 17 and part of paragraph 18 of the written statement of respondent no. 2, which we declined to consider, as the proviso to rule 42(1) had not been complied with.

“ On the 19th of May last (the date on which we commenced the actual enquiry, i.e. the recording of evidence) the respondent no. 1, by a petition, prayed for the alteration of point no. 9 for determination. The main ground for that petition was that, as the official marks on the ballot-papers were to be kept secret under the Bengal electoral regulations, those papers could not be inspected by the petitioner and that, therefore, the petitioner's allegation with regard to the absence of official marks on the back of some of the ballot-papers could not be enquired into. In our opinion there was no substance in this petition since regulation XXIX (2), enjoining secrecy of the official marks, obviously was applicable only when there was no enquiry on an election petition. When, however, such an enquiry was ordered on an election petition, in which the very question of non-observance of the secrecy referred to above was raised, the official marks could not be kept secret during that enquiry.”

It was alleged that on some of the ballot-papers the official mark had not been put on the back, and that, therefore, regulation XLVII (1) (a) had been infringed. The report states: “ We were, on the basis thereof, asked to reject such ballot-papers, in respect of respondent no. 1, as had not the official mark on their back, and thus to ascertain if the respondent no. 1 could still maintain his majority of 29 votes over the petitioner. One of us was inclined to enter into the scrutiny of the ballot-papers of all the candidates, and then to exclude such of them as did

not bear the official mark on the back. No doubt this would have been the only course, in fairness to all the candidates, had we been satisfied that some of the ballot-papers, in respect of respondent no. 1, did not bear the official mark on the back. All of us, however, eventually came to the conclusion that all the ballot-papers with regard to respondent no. 1 had sufficiently recognizable official mark on the back. The official mark is the letter 'B'. One of the polling officers, Babu Atul Behari Dutt, who, on the special prayer made by the petitioner on the 13th instant (towards the close of the arguments of the learned Counsel for the petitioner), was examined on the 14th *idem*, has described the process by which this mark was put. From his evidence it appears that the ballot-paper was put inside the press (exhibit I) with the back of the paper turned up, and that, by the pressure on the paper made by the officer, the impression produced on the back of the paper was the letter 'B' in relief, whilst that on the front of the paper was the same letter, hollow. Now, it appears that on some of the ballot-papers in question, the letter 'B' in relief appears on the front, and not on the back, and it was thus contended that those papers should have been rejected by the returning officer, and should now be excluded by us. We are unable to concede to this contention or to grant the request made. The question to be considered—*vide* 'Rogers on Election', page 148—is whether 'looking at each ballot-paper, there was evidence of an intention to make the official mark, and of a recognizable official mark, upon its back'. Now, the ballot-papers, in respect of respondent no. 1, which bear the official mark 'B' in relief on the front, and not on the back still bear, and that too, distinctly part of the same official 'B', though hollow. It is thus clear to us that there is evidence of an intention to make the official mark, and of a recognizable official mark, upon the back of each of these papers, though through inadvertence these papers were not put in the press with their back turned up, so that, by the pressure of the press, the impression produced on them could have been the letter 'B' in relief. There cannot be the slightest doubt, however, that there has been substantial compliance with the regulation XXXII of the Bengal electoral regulations in respect of such of the ballot-papers, the validity whereof has been questioned. The learned Counsel for the petitioner urged strenuously before us that the test to be applied, as referred to in the above passage in 'Rogers on Election', was based on section 13 of the English Ballot Act, and that the rules and regulations under the Bengal electoral rules and regulations did not contain any provision corresponding to section 13 of the English Ballot Act. We are, however, of opinion that under rule 44 (1) (c) of the Bengal electoral rules, we have to consider whether the irregularity in question has materially affected the result of the election. Bearing this in mind, therefore, as also the fact that both in England and in India

it is imperative, as a general rule of law, that a ballot-paper not bearing on its back the official mark must be rejected, the test referred to in the above passage is equally applicable in considering the effect of such an irregularity during an election in this country. Thus, for reasons already noted by us, the irregularity in question cannot possibly be said to have materially affected the result of the election."

With regard to the alleged infringement of regulation XXXIII of the Bengal electoral regulations, it was stated that at the polling station in ward no. 7 the polling officer, in almost all the cases, had seen the marks put by the voters on the ballot-papers against the names of candidates for whom they had voted, and that consequently the secrecy of voting enjoined by the above regulation had not been observed. The Commissioners reported: "Three witnesses have been examined on this point, two of them being voters and the third, Babu Gyanendra Narayan Choudhury (a pleader), being a polling agent for respondent no. 2. Gyan Babu's evidence does not show that the polling officer saw the marks put by the voters on the ballot-papers. All that Gyan Babu has stated is that some time after the polling had begun, the polling officer accompanied the voters, when the latter went from the polling room to behind a blackboard, to put their marks on the papers. The polling officer may have done this to expedite matters, as he was bound to see that the official mark had been put on the ballot-papers.

"As regards the other two witnesses—voters nos. 24 and 25 on the side of the petitioner, both of them, admittedly, canvassed for respondent no. 2 at the last Council election. Then again, it is not clear from the evidence of either of these two witnesses whether the polling officer actually saw the mark which had been put by these witnesses on ballot-papers against the candidates, for whom they had voted. According to witness no. 24, he inferred that the polling officer had been looking at the 'X' mark, because that officer asked the witness to fill up the paper and put it in the ballot-box, after which the witness happened to look at the polling officer and noticed that the latter was looking at the witness. The reason given by the witness no. 25 is equally unconvincing, it being to the effect that, when he was putting the 'X' mark the polling officer was standing near him.

"The evidence on this point is, therefore, in our opinion, meagre, unsatisfactory and inconclusive, and we accordingly hold that the allegation under consideration has not been proved.

"In connection with this point we may also note that, as the polling officer in question was eventually called at the instance of the petitioner, and was examined, as already noted by us, on the 14th instant the petitioner could have, with the permission of the court, easily questioned the polling officer (even though he had been originally cited by respondent no. 1, though not examined) also with regard to the allegation.

“ We must also note here that, although the petitioner’s verification in that petition contained the declaration that these allegations were true to his knowledge, the petitioner did not examine himself. In our opinion, the petitioner should have examined himself, as various other facts might have also been elicited from him during the cross-examination.

“ In conclusion, having regard to our findings noted in this report on the points in respect of which evidence has been adduced by the petitioner, we are of opinion that the petitioner’s election petition should be dismissed, and we beg to recommend accordingly to His Excellency the Governor of Bengal.

“ There further remains for us to consider the question of costs which should be paid by the petitioner to respondent no. 1. We have noted in the body of this report that the evidence adduced by the petitioner is not only unreliable and unsatisfactory, but that in many cases it has been procured for pecuniary consideration. In other words, to support the very grave and serious charges against the respondent no. 1, the petitioner had fabricated and manipulated evidence. Bearing this in mind, and further the fact that the enquiry has been a very long and protracted one, we further beg to recommend to His Excellency the Governor of Bengal that the petitioner be directed to pay to the respondent no. 1 Rs. 1,500 as pleaders’ fees, also the costs incurred by the respondent no. 1 in court and process fees and witnesses’ expenses.”

CASE No. XLI

Darbhanga North-East (N.-M.R.) 1931

(BIHAR AND ORISSA LEGISLATIVE COUNCIL.)

DHANRAJ SHARMA *Petitioner,*

versus

MAHANTH MANMOHAN DAS *Respondent.*

Disqualification follows automatically failure to lodge return of
election expenses within time.

The Local Government can remove disqualification in respect of
election to the Local Council: the Governor-General in respect of the
Central Legislature.

THE petitioner challenges the order of the returning officer, rejecting his nomination paper for election to the Bihar and Orissa Legislative Council from the North-East Darbhanga non-Muhammadan rural constituency, in consequence of which the respondent who was the only other candidate came to be declared elected.

The nomination paper was rejected because the candidate was held to be ineligible under rule 5(4), part II of the electoral rules.

It is contended on behalf of the petitioner that he was not suffering from any disqualification, and even if he was disqualified, this disqualification had been withdrawn by the Local Government under the proviso to rule 5(4) of the Bihar and Orissa electoral rules.

The position that the petitioner did not suffer any disability because no gazette notification to that effect has been produced cannot be supported. Rule 19 of the electoral rules requires the return of expenses to be filed within 35 days from the date of the publication of the result of an election; while rule 5(4) lays down that the failure to lodge the return within time will make the candidate ineligible for election for five years from the date of such election. There is no dispute that the petitioner was an unsuccessful candidate from this very constituency at the general election of 1926. The result of this election was published in the gazette of the 8th December, 1926, while the return was lodged by the petitioner on the 13th January, 1927, that is after more than 35 days. Therefore he became *ipso facto* disqualified. There is no provision in the rules that the disqualification need be published in the gazette. As we read the rule, the disqualification follows automatically the failure to lodge the return within time.

The question is whether this disqualification has been removed by the Local Government. The petitioner filed before the returning officer an affidavit with a copy of the letter of the personal assistant to the election officer to show that the disqualification was removed by the Local Government by an executive order and that this fact was communicated to all returning officers by a letter of which the number and the date were given therein. No counter affidavit seems to have been filed, and the returning officer does not appear to have taken any notice of the information in the letter annexed to the affidavit or to have referred to the communication stated therein. In order to do substantial justice between the parties we sent for the order removing the disqualification from the office of the chief secretary, especially as we found that the petitioner had not merely been allowed to stand as a candidate from this constituency in a bye-election of 1930, but also elected as a member of the Council and lodged his return of expenses in due time. The order has been received and seen by us. We find that by an order no. 107-A.R. of the 6th May, 1927 over the signature of Mr. M. G. Hallett as the

officiating Chief Secretary to the Government of Bihar and Orissa, the Local Government removed the disqualification of the petitioner in respect of his "ineligibility for election or nomination as member of the Bihar and Orissa Legislative Council". This settles the question of disqualification which the petitioner had incurred.

It is, however, urged by Mr. P. R. Das, Counsel for the respondent, that the petitioner should have got his disqualification removed by the Governor-General under the proviso to rule 5(4) of the Legislative Assembly rules, and not having done that, the disability to stand for the Local Council still attaches to him. Or, in other words the contention is that unless the disqualification in respect of all the legislative bodies is removed, a person cannot be eligible to stand as a candidate for any of them.

We are unable to accept this contention which receives no support from rule 5(4) of the Bihar and Orissa electoral rule and 5(4) of the Legislative Assembly rules to which reference has been made, or from any recognized authority. If the contention be sound, then the proviso to rule 5(4) authorizing the Local Government to remove any disqualification becomes nugatory. As we read the rules, the provision is made that the failure to lodge a return of expenses in time in respect of election to *any* Legislative Assembly (that is the Council of State, the Legislative Assembly or the Local Council) will entail disqualification under the Bihar and Orissa electoral rules in respect of election to the Local Council and under the Assembly rule in respect of an election to the Central Legislature; while the disqualification so far as the Local Council is concerned can be removed by the Local Government and that for the Central Legislature by the Governor-General. It would be contrary to the spirit and the wording of the rules if we hold that the removal of the disqualification by the Governor-General in respect of the Central Legislature is necessary in order to give legal effect to the removal by the Local Government of one's disqualification in respect of the Local Council. We hold that the subsistence of the disqualification in respect of the Central Legislature, does not affect the petitioner's eligibility to stand for election for the Local Council.

We find that the nomination paper of the petitioner is valid and has been wrongly rejected. We accordingly report to His Excellency the Governor that the election of the respondent is void, and that the nomination paper of the petitioner be accepted and the election be allowed to proceed according to law. We also recommend that the petitioner do get his costs assessed at Rs. 80 from the respondent.

CASE No. XLII

Dharwar District (N.-M.R.) 1924

(BOMBAY LEGISLATIVE COUNCIL.)

S. K. HOSMANI, LL.B., pleader, Haveri .. *Petitioner,*

versus

(1) V. N. JOG, LL.B., pleader, Dharwar ..
(2) S. T. KAMBLI, LL.B., pleader, Hubli .. } *Respondents.*
(3) C. C. HULKOTTI, LL.B., pleader, Dharwar .. }

Petition no. 2.

C. C. HULKOTTI, LL.B., pleader, Dharwar .. *Petitioner,*

versus

(1) V. N. JOG, LL.B., pleader, Dharwar ..
(2) S. T. KAMBLI, LL.B., pleader, Hubli .. } *Respondents.*
(3) S. K. HOSMANI, LL.B., pleader, Haveri .. }

Recount. Examination of challenged votes.

ON considering the ground on which the result of the election was challenged by the petitioners, the Commission thought the two petitions should be tried together in one proceeding, and the petitioners and the respondents in both the petitions admitted that that would be the most convenient course to adopt.

Further on the 1st of March, 1924 the petitioners jointly presented an application praying that the Collector of Dharwar, who acted as the returning officer, should be requested to keep present at the inquiry the witnesses and officers mentioned in that application, and further prayed that the Commission might be pleased to direct a recount before the commencement of the inquiry, as this would be convenient to the parties, would shorten the sittings of the Commission, and would materially reduce the expense of the parties. The Commissioners granted the application and the president deputed one of the Commissioners Mr. Palmer, to make the recount. He did so at Dharwar on the 6th, 7th and 8th March. His report is appended.

* * * * *

The whole inquiry is practically narrowed down to an examination of the challenged votes given in paragraph 4 of the recounting officer's report.

According to the return prepared and certified by the returning officer as required by regulation 6 of part VI of the regulations framed by Government under the Bombay electoral rules the candidates got the following valid votes :—

Mr. Jog	..	..	..	10,810
Mr. Kambli	..	..	..	10,644
Mr. Hulkotti	..	..	..	10,217
Mr. Hosmani	..	..	..	9,651

At the recount the undisputed valid votes which each candidate got were :—

Mr. Jog	..	..	..	10,842
Mr. Kambli	..	..	..	10,639
Mr. Hulkotti	..	..	..	10,139
Mr. Hosmani	..	..	..	9,588

The challenged votes which, as desired by the candidates, were kept separate for the Commissioner's decision were as follows :—

Mr. Jog	..	..	..	142
Mr. Kambli	..	..	..	190
Mr. Hulkotti	..	..	..	189
Mr. Hosmani	..	..	..	1,118

If Mr. Hulkotti's 189 challenged votes were added to the 10,139 valid votes obtained by him, his total would still be below the totals of the undisputed valid vote cast for the returned candidates Messrs. Jog and Kambli. The Commission therefore decided it was unnecessary to examine Mr. Hulkotti's challenged votes as he could not be declared elected, even if all were found to be valid.

In the case of Mr. Hosmani, the difference in the disputed valid votes, cast for him and Messrs. Jog and Kambli, the returned candidates, would be $(10,842 - 9,588) = 1,254$, and $(10,639 - 9,588) = 1,051$ respectively.

Consequently, if all Mr. Kambli's challenged votes were bad and all Mr. Hosmani's 1,118 challenged votes were good Mr. Hosmani would be entitled to be returned in place of Mr. Kambli.

The Commission, therefore, began with the examination of Mr. Kambli's challenged votes. The majority of the ballot-papers on which his challenged votes were recorded was examined and he was found to be entitled to 104 valid votes on the papers examined.

As the addition of 104 valid votes to Mr. Kambli's admitted total of 10,639 placed him beyond Mr. Hosmani's reach even if Mr. Hosmani's challenged votes were all held to be good, it was not considered necessary to continue the examination of Mr. Kambli's challenged votes or to examine those of Mr. Jog or Mr. Hosmani at all, as no decision on them would have affected the return of Messrs. Jog and Kambli as duly elected candidates.

The Commissioners wish to bring to the notice of Government that the printed page of the form on the front of the ballot-papers, used for this constituency, ignored the special direction given in the note below form I and appearing at page 53 of the Bombay electoral rules and the Bombay electoral regulations. In the ballot-paper in question, while there were only four candidates at the election, the ballot-papers provided six spaces, with the result that several marks purporting to be votes were recorded either in one or other of the blank spaces below the last candidate's name, and in the opinion of the Commission gave reasonable ground for at least Mr. Hosmani, the fourth candidate on the paper, to contend that all the marks made in the blank space below his name or symbol were intended by the voters for him.

In this case, however, the Commission came to the conclusion that the result of the election could not be considered to have been materially affected, as even if the benefit of such marks were given to Mr. Hosmani, he could not claim to succeed.

The Commissioners consider that the respondents, Messrs. Jog and Kambli have been duly elected.

On the question of costs, the Commission think that the respondents Messrs. Jog and Kambli are entitled to their costs. The petitioners must pay Rs. 140-4-0 in respect of costs of witnesses and Rs. 100 for

pleaders' fees in the two petitions and Rs. 4 for stamps for vakalats. One set of costs only is allowed for both petitions and for both respondents.

Under the circumstances of this case and having regard to the irregularity in the form of the ballot-papers noticed above, the Commission is of opinion that Government should receive only three-fourths of the cost of setting up this tribunal, and costs incidental thereto, out of which, one-half should be recovered from Mr. Hulkotti and one-fourth from Mr. Hosmani.

The petitioners shall bear their own costs.

Report of the Commissioner appointed by the President to make the recount of the votes given in the election for the Dharwar District non-Muhammadan rural constituency.

1. I made the recount in the Collector's office at Dharwar on the 6th, 7th and 8th March, 1924 with the help of the Collector's establishment in the presence of the candidates, their representatives and agents.

2. In view of the allegation made in the petition of Mr. Hulkotti that the candidates and their agents had not been allowed a reasonable opportunity to inspect the ballot-papers when these were counted by the returning officer I allowed the candidates to inspect and object to ballot-papers, and those alleged to have been wrongly accepted by the returning officer were kept apart for the Commission to decide as to the validity of the objections made.

3. The result of the recount was as follows :—

For Mr. Jog, the undisputed votes were	..	10,842
For Mr. Kambli, the undisputed votes were	..	10,639
For Mr. Hulkotti, the undisputed votes were	..	10,139
For Mr. Hosmani, the undisputed votes were	..	9,588

4. The challenged votes were :—

For Mr. Jog	..	..	..	142
For Mr. Kambli	..	..	..	190
For Mr. Hulkotti	..	..	..	189
For Mr. Hosmani	..	..	..	1,118

5. The challenged votes have been kept separate for the Commission to decide as to their validity or otherwise.

CASE No. XLIII
Dibrugarh (N.-M.R.) 1927 .
(ASSAM LEGISLATIVE COUNCIL.)

SRIJUT LAKHESWAR BAROOAH, B.L. *Petitioner,*

versus

SRIJUT NILMONI PHUKAN, B.L. *Respondent.*

Owing to an incomplete list of voters being supplied to the polling officer, some 236 voters were unable to vote.

Held that as the majority of votes secured by the successful candidate was only 154 this was an irregularity which had materially affected the election. The election was declared void.

THE petitioner seeks to have the election declared void on the ground that the result of the election has been materially affected by non-compliance with certain rules and regulations made under the Act.

The issues for consideration were whether there was a non-compliance with any of the rules or regulations made under the Act; and, if so, whether the result of the election was materially affected by such non-compliance.

The returning officer stated that he found it necessary to publish the date and time and place of voting through the mauzadars¹ as is usually done, but in the Khowang district of the electorate there was no such publication. There was therefore in this case a breach of rule 11 (2) (c) and regulation 17 made under the Act, inasmuch as the date and time and place of the poll was not published (as required by the Local Government), at a place in the constituency, at which the returning officer considered this information should be published.

The names of 69 voters, whose polling station was Moran, were not, in the first instance, included in the list of voters with which the polling officer there was provided. Fifty of these voters came to vote for Srijut Lakheswar Barooah, but none of them were allowed to vote until 4 P.M., after the list containing their names had been received by the presiding officer. By that time 36 or 38 of them had gone away. These voters would most probably have voted had the list containing their names been with the presiding officer during the whole period (from 10 A.M. to 5 P.M.) fixed for the poll.

Again the names of 296 voters whose polling station was Tinkhong lower primary school, were omitted from the list of voters supplied to the presiding officer there. Their names were on the electoral roll for Jaipur and the list containing them was sent to Jaipur by mistake. Of these voters about 200 (as appears from the evidence and the written statements filed) attended to vote for the petitioner, but they were not allowed to vote inasmuch as their names were not on the list of voters supplied to the polling officer at their polling station, which was Tinkhong lower primary school, as they are residents of Tinkong mauza for the whole of which this was the polling station.

In these two cases there was a breach of regulation 22 of the Assam electoral regulations, which lays down that the returning officer shall provide at each polling station copies of the electoral roll or of such part thereof as contains the names of the electors entitled to vote at such station.

The petitioner has not shown that the result of the election was materially affected by non-publication of the date, place and time of the

¹ Officers who collect Government revenue.

election under rule 11 (2) (c) and regulation 17 through the mauzadar, inasmuch as the evidence shows that this information was fully published by the candidates themselves, and there is no evidence that any electors and, if so, how many failed to vote for the petitioner owing to such non-publication.

The petitioner has however succeeded in showing that the result of the election was materially affected by the breaches of regulation 22 referred to above, inasmuch as about 36 voters who attended to vote for him at Moran, and about 200 who attended to vote for him at Tinkhong lower primary school, were unable to vote. Had these electors been able to vote the result of the election would, we think, have been materially affected inasmuch as the majority of votes secured by the successful candidate was only 154.

The election of Srijut Nilmoni Phukan, B.A., as member for the Assam Legislative Council for the non-Muhammadan rural constituency of Dibrugarh is therefore declared void under rule 44(c) of the Assam electoral rules.

The parties should bear their own costs.

CASE No. XLIV

Dinajpur (M.R.) 1924

MAULVI YAQINUDDIN AHMAD *Petitioner,*

versus

MAULVI KADER BUX *Respondent no. 1.*

MUNSHI MAFIZUDDIN CHAUDHURY „ 2.

An Election Inquiry Commission is not concerned with the filing of the petition its acceptance or the appointment of the Commission.

Personation must be held to have been committed whenever the requisite facts have been proved, regardless of the intentions or knowledge of the offender.

Personation and false statements discussed. It is considered "very doubtful" whether the latter, if referring to public conduct of candidate can be excluded.

THIS is a petition by Maulvi Yaquinuddin Ahmad, one of the candidates at the election for the Dinajpur Muhammadan constituency, challenging the return of the successful candidate Maulvi Kader Bux, respondent no. 1. Briefly stated, the election is challenged on the ground that corrupt practices were committed, viz. : (1) a corrupt practice under clause 3 of part I of schedule V of the election rules in that the agent or agents of the successful candidate's agent procured or abetted the personation of a voter Jhoru Mamud Mandal at the polling station at Habra school ; (2) a corrupt practice under the same clause in that the successful candidate himself procured or abetted the personation of a voter Kafuruddin Shaikh at the polling station at the Dinajpur municipal office ; (3) a charge under clause 4 of part I of the said schedule in that false statements of fact relating to petitioner's conduct were made in the leaflet referred to as exhibit A in the petition ; and (4) a corrupt practice under rule 8 of part II of the said schedule is that the leaflet, exhibit A, does not contain the name and address of the publisher thereof on the face of it. On these allegations the petitioner asks that the election be declared void and that he be declared duly elected.

Respondent no. 1, the successful candidate, denies all the charges ; he has also in his written statement contended that the election petition filed by the petitioner is not in proper form, and has not been properly verified ; he also questions the power to allow amendment of the petition.

Respondent no. 2 has taken no part in the proceedings. We had no hesitation in declining to consider the objections taken by respondent as to the form, verification, and amendment of the petition allowed by His Excellency on the ground that it is not open to us to consider what happened from the filing of the petition to the appointment of the commission. We also held that under rule 33(3) we have clearly power to allow amendment of particulars.

We also decided in respect of petitioner's claim to be declared duly elected that the prayer could not be seriously entertained. Respondent no. 1 obtained 4,380 votes, respondent no. 2 obtained 1,304 votes and petitioner obtained 190. Petitioner declared in his petition that respondent no. 2 had " agreed that he will not claim his preferential right " and it was asserted at the bar and not denied, though not proved, that a formal deed of release had been executed to that effect. It is clear that such an agreement can have no effect whatever and that it is an interference with the right of the electors of the constituency to select their representative by their votes. Even if there had been no other candidate it is clear to us that when polling has taken place the Commissioners cannot declare a defeated candidate to have been duly elected, unless after striking out the invalid votes on both sides it is found that the claimant has polled the largest number of valid votes actually given.

We consider in view of the novelty of election proceedings in this country that rule 34 of the electoral rules might be amended so as to afford some guidance to petitioners as to the circumstances in which such a claim is proper.¹

We further decided that as the respondent no. 1 accepted responsibility for the publication of the leaflet, exhibit A of the petition, which is exhibit 2 of these proceedings, and as it did not contain the name and address of the publisher on its face, the fourth corrupt practice charged had been clearly made out, but that as the petitioner asserted and respondent no. 1 admitted that the leaflet was distributed by the agents of this respondent the omission could not possibly be held to have materially affected the result of the election. Under rule 44 (1) (a) this corrupt practice would not, therefore, invalidate the election. We accordingly declined to frame an issue on this point, but reserved for our consideration the question of what recommendation, if any, should be made by us as to the exemption of the respondent from the disqualification incurred by him.

After deciding these matters we framed the following issues :—

- (1) Does the leaflet, exhibit A, containing as it does extracts from the report of the committee on the amendment of the Bengal Tenancy Act without the observations in the note of dissent thereto, amount to a false statement as to the conduct of the petitioner ?
- (2) If so, did the respondent no. 1 believe it to be false or did he not believe it to be true ?
- (3) Is the statement at the bottom of the leaflet, exhibit A, that the committee recommended the proposals to be carried into law false ?
- (4) If so, did the respondent believe it to be false or did he not believe it to be true ?
- (5) Was either of such statements, if false, reasonably calculated to prejudice the prospects of the petitioner's election ?
- (6) Is the charge of personation in paragraph 12(a) of the petition established ?
- (7) If so, was the personation at the instance of, or with the connivance of, the respondent's agent ?
- (8) Is the charge of personation in paragraph 12(b) of the petition established ?
- (9) If so, was the personation at the instance of, or with the connivance of, the respondent ?

¹ *Vide* paragraph 3(2) of part III of the Corrupt Practices Order, 1936.

Of these the issues in relation to the leaflet have, at the hearing, been found to be the most important, and we therefore reserve them to be dealt with last of all.

Issues nos. 6 and 7 relate to the charge of personation at Habra. The only evidence adduced on this charge is that at that polling station the vote of a man claiming to be Jhoru Mamud Mandal was challenged. No further evidence having been adduced by petitioner we decided that no case had been made out which respondent was called on to meet and find that this charge of personation is in no way proved and that issue no. 7 does not arise.

Issue no. 8 deals with the charge of personation at the Dinajpur municipal office. It is clearly proved by the evidence on both sides that apart from the man who is said to have personated Kafuruddin six persons only were present in the polling booth, viz. the presiding officer, the polling officer, the petitioner and his polling agent, and the respondent no. 1 and his polling agent. All these have been examined, and as to most of the facts in connection with the incident there is no dispute. That a man giving his name as Kafuruddin and his father's name as something quite different from Abdul Hakim appeared at the poll; that his vote was challenged by the petitioner but that he was allowed to vote after identification, the necessary entries being made in the list of challenge votes; that subsequently another man appeared who gave his name either as Kafuruddin or as something slightly different from it and his father's name as Abdul Hakim, and that his vote was taken on a tendered ballot-paper, are undisputed facts.

It was argued before us that personation being a corrupt practice a corrupt motive must be established, and that if a man has an innocent motive, or acts under a *bonâ fide* mistake, he cannot be held guilty of personation. That this is the English law as to personation seems certain, and the same view was adopted in this country in the *Punjab South East Towns* case (see page 584). We are, however, unable to agree with this view and would observe that in the precedent above quoted the Commissioners followed their decision in the *Rohtak* case which relates to an offence defined in section 171C of the Penal Code, in which the word "voluntarily" occurs and not to an offence defined in section 171D in which no such word is to be found. As our view leads to the apparently absurd conclusion that a man may be convicted of an offence under section 171F, however innocent his intention, we consider it desirable to give our reasons for the view in order that the question of removing this apparent defect in the electoral law may be considered. The definition of personation in the election rules and in the Penal Code is taken from the English Corrupt and Illegal Practices Prevention Act of 1883. By that Act personation is declared to be punishable as a felony. The Act itself is silent as to the motive or intention of the offender, but the

doctrine of *mens rea* as applicable to felonies has led to the decision in England that before a corrupt practice can be held to have been committed a corrupt motive (which the later authorities show may exist without any moral corruption) must be established. In this country the doctrine of *mens rea* has been held inapplicable since the passing of the Penal Code on the ground that the definitions of offences in the Code describe the intention, knowledge, etc. which must be proved before a particular offence can be held to have been committed. We are therefore unable to follow the English courts in applying the doctrine of *mens rea* and are compelled to look to the section itself in the Penal Code and to interpret it as it stands with reference to the various definitions in the Code. The section being silent as to the intention or knowledge of the offender and containing, so far as we can see, no word the definition of which introduces any question of knowledge or intention, it necessarily follows that the offence must be held to have been committed whenever the requisite facts have been proved, regardless of the intention or knowledge of the offender.

There is a further difficulty in the way of our accepting the English rule that a corrupt practice cannot be proved unless a corrupt motive is shown. Every electoral offence described in schedule V is called a corrupt practice. In English law there is a clear distinction between corrupt practices and illegal practices, and in the case of the latter motive or intention is immaterial. Schedule V includes what are corrupt practices in England as well as what are illegal practices. If therefore the English rule as to corrupt practices be followed, a practice such as the hiring of a liquor shop as a committee room, which is quite clearly meant to be forbidden absolutely, will in this country be permissible if the intention of the hirer is innocent.

We therefore hold that we are not concerned with the honesty or otherwise of the person said to have committed personation provided his acts fall within the words of the rule. On the evidence before us in this case we are fully satisfied that there is only one entry in the electoral roll under which either of the two persons who voted can come, viz. entry no. 36 of ward D in which the elector's name is given as Kafuruddin and his father's name as Abdul Hakim. We are further satisfied that each of the two persons is qualified and that both should have been on the roll. The first man's name is that given in the roll, but father's name does not tally; the second man's name is, we are convinced, Kafiruddin *alias* Gafaruddin; he gives his father's name as Abdul Hakim, but in his service roll in the District Judge's office, where he is employed as a process-server, his father's name is given as Hakim Muhammad. While it would appear to be more probable that the entry in the roll is intended to refer to the second man, it is impossible to say with any certainty that it does refer to him and to him alone. Personation is a criminal

offence, and before the offence can be held to be established it must be proved that the person entered in the roll is beyond any reasonable doubt some one other than the man charged with personation. We find it impossible to say on the materials before us that either of these two would be voters is, or is not, the voter entered in the roll, nor do we see any chance of obtaining any more light on the matter by calling any further witnesses. We accordingly hold that this charge of personation has not been proved. We wish to add that in coming to this conclusion we have considered the novelty of election procedure in this country and the knowledge of that procedure which may reasonably be expected, but we would respectfully follow the precedent of the *Boston* case in 1878, which is reported in 2 O'Malley and Hardcastle at page 165 and observe that it by no means follows that either this commission or any other commission will, even on the same apparent state of facts, hold in any subsequent case that the offence of personation has not been committed, for in each case the existing state of knowledge and the existing circumstances have to be considered.

In view of our decision on issue no. 8 the question raised in issue no. 9 does not strictly arise; but as the charge has been made we think it only fair to respondent no. 1 to say that in our opinion even if Fakuruddin, the first comer, had been held guilty of personation, the evidence before us in no way establishes that the candidate himself did anything improper. We have not been asked to, and do not, hold that petitioner has intentionally given an untrue account, but a candidate at an election generally views the acts of a rival candidate through a dense cloud of prejudice and his subsequent recollection of any incident is liable to be affected by prejudice. The polling agent of petitioner admits that the respondent said he did not know the man; and after that statement it is obviously impossible to hold that the candidate was abetting personation. We would, however, observe that at this polling station the polling agent of respondent no. 1 was the brother of the presiding officer. We do not consider the latter in any way affected by this as he had no power to refuse to admit any authorized polling agent and there is no reason even to suspect in the present case that anything improper was done by either of these gentlemen during the voting. But the undesirability of such a close relationship between the presiding officer and the polling agent of one candidate is obvious, and we are surprised that the agent in question who is a pleader should not have seen the impropriety of his acting at that particular polling station.

We now turn to the most important question. Although issues nos. 1 to 5 do not specifically refer to the interpretation of clause 4 of part I of schedule V it is necessary to consider that rule. There can be no question that the leaflet, exhibit 2, contains no statement about the personal character or personal conduct of the petitioner, and it has been

strongly urged on behalf of the respondent that clause 4 does not apply to statements of fact in relation to the public conduct of a candidate. To decide this point we have found it necessary to refer to the English authorities, and we desire to express our indebtedness to the learned pleader for respondent who has furnished us, both on this question and on the other questions of law discussed, not merely with commentaries on the English election law but with various volumes of O'Malley and Hardcastle's reports of English election cases. The contention urged for respondent finds great support from many expressions in the English cases, and the rule we have to interpret is practically a verbatim copy of the English law. But *prima facie* the words "personal character or conduct" do not necessarily show that the conduct must be personal, apart from considerations arising from the conditions of a particular country which will be dealt with later, there is no apparent principle on which a deliberately false statement of fact relating to the public conduct of a candidate should be permitted by the election law. Only two instances have been brought to our notice or discovered by us in which statements as to what was clearly public conduct have been before the Election Courts in England, but we recognize that this may be due to the fact that the general trend of the English cases is in favour of the view that statements as to such conduct do not concern those courts. The first of the cases referred to is the *Cockermouth* case (5 O'Malley and Hardcastle, page 155). At page 163 a statement that a candidate voted in Parliament in a particular way is considered. Though holding that this was not criticism of personal conduct Darling, J., proceeded to find that it was to a very large extent true. In the *Attercliffe Division* case reported in the same volume Walton, J., at page 223 states, "paragraphs 3 and 4 to my mind relate obviously to public acts and to public conduct alone. I do not say that they may not be within the Act"; he then proceeds to decide the case on the ground that the statements are not false statements. We are unable to hold that the English authorities definitely decide that only statements relating to personal conduct and not those relating to public conduct come within the rule. We would observe that it appears to us a matter worthy of serious consideration whether the exclusion of statements relating to public conduct from the purview of the rule is desirable under present conditions in this country. The English law on the subject was only passed in 1895, and if it was intended to exclude public conduct the reason may well have been that the electorate was very largely literate and also in the habit of reading newspapers, which were numerous and widely circulated. False statements as to public conduct would therefore not be likely to mislead most of the electors, and their falsity could be easily and speedily shown. These considerations do not seem to apply to this country as yet, and in view of the damage which could be done

to a candidate's prospects at an election by the circulation of false statements as to his public conduct we are very doubtful whether the rule was ever intended in this country to exclude such statements. We are, however, relieved of the necessity of deciding this question definitely in view of our conclusions on the question whether the present case can be brought within the rule at all.

The petitioner's case is that the leaflet deliberately ascribes to him opinions on the amendment of the Tenancy Act which he does not hold. Respondent's case is that the leaflet deals with the report of the committee and not with the views of the individual members thereof. We are fully satisfied that if the leaflet professes to describe petitioner's individual opinions it contains undoubtedly false statement of those opinions. We also hold that if respondent intended to deal with petitioner's individual opinions he was bound to refer to the latter's note of dissent before asserting as a fact that petitioner held any particular opinion, and that if he did not do so he could not expect us to hold that he really believed his statements to be true nor even that he did not know them to be false. On the other hand, we hold that if the leaflet was issued in reference to the report of the committee there was no necessity to refer to the minutes of dissent. We further hold that the statement referred to in issue no. 3 clearly relates to the report of the committee as a whole and therefore does not come within the rule as to statements about a candidate. We have been asked to hold that if a leaflet contains statements of fact each clearly true, but the inference which would be naturally drawn from them would, owing to the failure to state certain other facts, be false, then there is a false statement of facts in the leaflet. We can find no authority in support of this view and we are not prepared, in view of the undoubted latitude allowed to candidates at elections, to hold that anything except a direct statement of fact can come within the rule. Our decision therefore must depend on the answer to the question, does the leaflet refer to the individual opinions of the petitioner or to the report of the committee as a whole? After full consideration of the matter we think the answer must be in favour of respondent. We see no reason to doubt his sworn statement in view of the perfect frankness with which he accepted responsibility for the publication, and his assertion receives considerable support from the view of the leaflet expressed in exhibit B, a letter from one of petitioner's polling agents which the petitioner filed in court of his own accord. That the fact of the petitioner being a member of the committee was intentionally brought to the notice of the electorate is clear, seeing that his name was placed at the head of the list and Dinajpur was printed after it. But after considering the leaflet most carefully we hold that the statements of fact contained in it with which we are concerned are that a certain committee had submitted a certain report and that petitioner was a member of that

committee. Both those statements are true and as the electoral law so far as we can see does not concern itself with opinions, suggestions, inferences or innuendoes but merely with statements of fact, we hold that petitioner has failed to bring the leaflet within clause 4. We therefore answer issue no. 1 in the negative and hold that issues nos. 2, 3, 4 and 5 do not arise.

To sum up, we hold that of the corrupt practices alleged the first three have not been proved, that the fourth charge under clause 8 of part II of schedule V has been proved, but that the corrupt practice did not materially affect the result of the election. We accordingly report that the respondent no. 1, Maulvi Kader Bux, was duly elected by the Dinajpur Muhammadan constituency. We further report that Maulvi Kader Bux was guilty of a corrupt practice under clause 8 of part II of schedule V in that he published the leaflet (exhibit 2) without the name and address of the publisher on the face thereof. In view of his frankness in the matter and of the fact that the cost of printing the leaflet is included in his return of expenses filed before the present petition, we accept his statement that the omission was purely accidental. In view of the unfamiliarity of the electoral law we accordingly recommend that Maulvi Kader Bux be entirely exempted from the disability imposed by rule 5 of the electoral rules.

We have considered the question of costs but see no reason to depart from the ordinary rule that a person who fails to establish anything by a very minor part of his case should be mulcted in costs. We accordingly recommend that the costs of respondent no. 1, which we assess at Rs. 600, should be paid by the petitioner to that respondent and that petitioner should bear his own costs.

CASE No. XLV

Farrukhabad District (N.-M.R.) 1927

RAI BAHADUR SARUP NARAIN *Petitioner,*

versus

(1) LIEUTENANT RAJA DURGA NARAIN SINGH OF
TIRWA } *Respondents.*
(2) BABU BINDRABAN KATTAR }

Personation and bribery proved.

What constitutes "undue influence" discussed.

A self-laudatory statement does not fall within the definition of "false statements".

Charity may or may not amount to bribery. It depends on the motive of the donor.

The law of agency in election goes much further than the ordinary law of principal and agent.

The filing of a false return of election expenses is an illegal, not a corrupt practice, but the seat becomes "liable to vacation".

Particulars of omissions in declaration of election expenses need not be given.

THE petition contained allegations of personation, undue influence, the publication of false statements in favour of the respondent and of other false statements against the petitioner, intimidation, bribery, the working of district board servants for the respondent no. 1, the publication of notices without the names and addresses of the publishers, and the incorrect and false return of the election expenses of respondent no. 1 in material particulars, and prayed for the seat.

Respondent no. 2 was absent and took no part in the enquiry. Respondent no. 1 filed a written statement and a recriminatory petition under electoral rule 42. He charged the petitioner with personation, bribery, and undue influence.

Evidence was produced in support of four cases of personation. At the Tajpur polling station, Kedar Singh was alleged to have personated his brother Dip Singh, Sarnam Singh personated Bachan Singh and Champat Singh personated Ram Singh. All these persons were identified at the polling station by Bhagwan Din, an agent of the respondent.

Kedar Singh deposed that Bhagwan Din visited his village several times for the purpose of canvassing for the respondent, and that on the morning of the polling day he enquired about his brother Dip Singh. He at first hesitated to cast a vote for his brother Dip Singh, as he was not a voter, but on being assured by Bhagwan Din that there was no harm in doing so, he went to the polling station in the company of Sarnam Singh and Champat Singh, and obtained a signature slip from the clerk on being identified by Bhagwan Din. He then went to the polling officer, secured a ballot-paper and cast his vote for the respondent. A patwari deposed that the three men named told him that they had given votes in place of other people. The Commissioners found that the three persons Dedar Singh, Sarnam Singh and Champat Singh had falsely personated three other electors and that Bhagwan Din knowingly identified the former as being the real voters and accordingly abetted the offence of personation.

“It has been contended on behalf of the respondent no. 1 that the identification by Bhagwan Din of Kedar Singh, Sarnam Singh and Champat Singh was in good faith after making proper inquiries from the villagers of Mandal Shankerpur, and, therefore, he cannot be guilty of the offence of abetment of false personation. We do not accept their contention, and we have already held that Bhagwan Din was fully aware that Kedar Singh, Sarnam Singh and Champat Singh were not the real voters. Further the duties of Bhagwan Din at the polling station are defined by regulation 21 of the regulations for the election of members of the Legislative Council of the United Provinces published by the Local Government. The regulation lays down that ‘every signature or thumb-impression so made shall be attested by any candidate or his

representative as aforesaid who may be able to recognize the voters'. Bhagwan Din was the representative of the respondent no. 1 at the polling station and it was his duty to acquaint himself with the rules and with his duties. According to his statement, he had no personal knowledge of Kedar Singh, Sarnam Singh or Champat Singh and there was no justification, therefore, for his identifying them. We find support for this view from the *Jaunpur* case (see page 421).

“There is abundant evidence on the record to prove that one Jai Jai Ram personated his deceased father Ram Lal shown as voter no. 272 on the electoral roll.

“An agent of the respondent was present at the polling station and saw one Padam Deo Narain Singh bring Jai Jai Ram to the clerk issuing the identification slip. This agent, after Jai Jai Ram had asked for a ballot-paper informed the polling officer that the elector's name was Jai Jai Ram and that he was attempting to vote in the place of his father Ram Lal. He also presented a written complaint to that effect.”

The Commissioners found that Padam Deo Narain Singh was a servant of the respondent, was working in his election office and acted as his polling agent at Fatehgarh and that he was receiving voters on the road and was directing them to the respondent's office, where they were given number slips which they took to the clerk and obtained their identification slips. The Commissioners commented on the fact that the respondent's agents at the polling booth made no attempt to controvert the statement or charge brought by Brij Nandan Lal against them and held that “this omission indicates that Jai Jai Ram was produced by Padam Deo Narain Singh, an agent of the respondent, for the purpose of falsely personating his father”.

In the matter of undue influence it was alleged by the petitioner that the respondent obtained a large number of votes by exercising undue influence through Nawab Muhammad Sultan, Sri Ram (the head of Bindraban Gurukul), Tilak Singh, Bachan Singh and Banwari Lal. “We may note at the outset that it is not every influence which is corrupt within the meaning of the electoral rules. Influence or persuasions can validly be exercised by one person upon another. It is only when the element of compulsion comes in that the influence becomes illegal. We may observe that in the case of bribery too persuasion is exercised ; but compulsion is wanting. The man bribed is selling his right of free voting willingly and voluntarily without any threat, force or violence brought to bear upon him ; but in the case of undue influence of exercise of free will is taken away. In order to avoid an election on the ground of undue influence it must be shown that threat or violence was instigated by the candidate or his agents for whom he is responsible, or it must be shown that it was to such an extent as to prevent the election from being an entirely free election. It is therefore, only ‘undue influence’ which is

illegal. Willes, J., in *Lichfield* (I O'M. & H., 28) observes that 'The law cannot strike at the existence of influence. The law can no more take away from a man who has property or who can give employment the insensible but powerful influence he has over those whom, if he has a heart, he can benefit by the proper use of his wealth than the law could take away his honesty, his good feeling, his courage, his good looks, or any other qualities which give a man influence over his fellows. It is the abuse of influence with which alone the law can deal. Influence cannot be said to be abused, because it exists and operates'. Hammond in his 'Indian Candidate and Returning Officer' says, at the bottom of page 143, that 'the large land-owner, the commercial magnate, or the successful lawyer, must inevitably be men of "influence"'. It is only if they exercise that influence "corruptly" so that something is done or prevented which the law desires should not or should be done, that they are guilty of a corrupt practice'. Now, keeping in view the above considerations, let us examine the facts of each case of undue influence alleged by the petitioner.

"Nawab Muhammad Sultan is a zemindar, an honorary munsif and an honorary magistrate of the first class. He deposes that twice or thrice the respondent no. 1 came to him before the election and asked him to try that his tenants might vote for him, and that he directed the *karindas* that his tenants should give votes for the respondent. There is no satisfactory evidence on the record to show that any compulsion was brought to bear upon Nawab Muhammad Sultan or his tenants to vote for the respondent. The petitioner has not produced a single voter to establish that undue influence was exercised upon him in order to give vote for the respondent. Further, we are not prepared to believe Nawab Muhammad Sultan that he actually spoke to his *karindas* to direct the tenants to vote for the respondent no. 1. Nawab Muhammad Sultan's promises of help to the respondent were unreal and hollow, and he never meant to fulfil them. He admits that he was not pleased with the respondent's work in the last Council, as he had been opposing the cause of the zemindars and upholding that of the tenants. He also says that in his heart he did not wish that the respondent should be re-elected as a member of the Council. He, inwardly being opposed to the re-election of the respondent would, we are sure, never have given any help to him by directing his (Nawab Muhammad Sultan's) tenants to vote for him (respondent). We find that no undue influence was exercised upon Nawab Muhammad Sultan or his tenants by respondent.

"It is alleged by the petitioner that undue influence was exercised by respondent over Arya Samajists through Sri Ram, the head of Bindraban Gurukul. Sri Ram has been cited by the petitioner. His statement is that the respondent did not exercise any undue influence over Arya Samajists through him. There is no evidence on the record to point out that Sri Ram influenced any Arya Samajist for voting for the respondent

no. 1. On the other hand, Sri Ram asserts that the Arya Samajists of the United Provinces have no personal concern with him.

"It is asserted by the petitioner that Tilak Singh, as an honorary magistrate, exercised illegal influence over the voters residing within his magisterial jurisdiction. Two witnesses have been cited in support of this assertion. Shaukat Ali states that Tilak Singh visited village Talgram before the election and threatened the voters with imprisonment if they did not vote for the respondent. We place no reliance on the evidence of this witness. In cross-examination, he says that Tilak Singh threatened Shamle, Kesri and Chheda Kachhis, but admits that the threat was not held out in his presence, and that he had heard of it from the Kachhis. Gur Dial deposes that Tilak Singh called zemindars and tenants of various villages and asked them to vote for the respondent and threatened that if they would not do so, he would become angry with them. He states in cross-examination that when Tilak Singh had asked men to vote for the respondent it was a mela day and about 300 men were present. We do not think it probable that Tilak Singh would hold out threats to the voters in the presence of such a large number of persons. The statement of this witness cannot be credited, because he is a professional witness and has given evidence hundreds of times in court. "The respondent no. 1 has examined Tilak Singh. He vehemently asserts that it is absolutely false that he exercised undue influence over tenants for voting for the respondent. We hold that the petitioner has failed to prove that any undue influence was exercised over voters through Tilak Singh."

The Commissioners held that certain alleged laudatory statements made by the respondent in his own favour did not come within the purview of the definition of "publication of false statements" as given in paragraph 4, part I of schedule V, of the electoral rules. It was said that he falsely gave out that he got a senior doctor stationed at Farrukhabad; that he was responsible for the building of a passenger shed at the railway station at Farrukhabad and that he was a Congress man. The Commissioners held that only such false statements fall within the definition as are "reasonably calculated to prejudice the prospects of such candidate's election. Now in the present case the false statements in question are alleged to have been made in respect of the conduct of the respondent in order to raise him in the estimation of a certain class of voters and thus improve and not prejudice his prospects. The alleged statements do not therefore fall within the above definition."

The list of particulars contained several alleged false statements against the petitioner.

It has been said that the respondent falsely stated against the petitioner that he had (a) "dismissed a large number of municipal servants"; (b) "dissolved many municipal schools and thus saved the

boys from the trouble of having to read "; (c) "imposed a tax on dogs and sent those who did not pay tax to the other world "; (d) "removed many lanterns and reduced the supply of oil, so much so that the municipal lanterns went out at midnight "; (e) "charged Rs. 13 from the Ramlila committee, Farrukhabad, for watering the streets at the time of Ramlila "; (f) "become a service disaster "; (g) "not got the roads repaired in rainy season, but got the dry road prepared to enable the voters to go to the booths without jumping "; (h) "got a meat shop opened at Farrukhabad in front of a Thakurdwara ", and (i) been "an enemy of the Congress ". These charges were published in a leaflet. The case of the petitioner is that the respondent got the leaflet printed. The respondent denies its publication. The original of the leaflet is in the handwriting of Jagat Narain Sharma. The final proof was corrected by Jagat Narain Sharma, and there is an endorsement on it for the printing of 1,000 copies. Jagat Narain Sharma was, no doubt, the agent of respondent for doing election work. He admits that the respondent engaged him for election purposes and he worked three hours daily for him. Kedar Nath, a witness of the respondent no. 1, deposes that Jagat Narain Sharma was canvassing for the respondent no. 1 in Farrukhabad. Kesho Ram Tandon, managing agent of Fine Arts Press, states that Jagat Narain Sharma was a clerk of the respondent and writing leaflets and correcting proofs in his (Kesho Ram Tandon's) office. He further says that the printing charges of similar leaflets were paid by the respondent. It has been contended on behalf of the respondent that there is no delivery voucher on the record to show that the respondent had ordered the publication of the leaflet. We find that some delivery vouchers have not been filed in this case by the respondent no. 1 and one of them may be the delivery voucher of leaflets similar to this. We have no hesitation in coming to the conclusion that Jagat Narain Sharma was the agent of the respondent no. 1 for election purposes and that the leaflet was published by the respondent.

As regards the statements of the dismissal of a large number of municipal servants, the closing of municipal schools, the imposing of dog tax, the removal of street lanterns and the reduction in the supply of oil, the charging of sum of money from the Farrukhabad Ramlila committee for watering streets, and the repairing of the road, we find that they are substantially true. The report of the municipal retrenchment committee and other documents of the municipal board on the record show that it had been resolved to make the reductions complained of.

Now the question arises whether the statements in question refer to the personal character or personal conduct of the petitioner, or are statements in relation to his public character. It appears that on the publication of the leaflet the petitioner published a rejoinder. The

petitioner states in it that all the acts complained of were done by the municipal board and nothing was done by him in his personal capacity. In his petition, too, he states that it was alleged against him by the respondent that many wrongful acts were done by him as chairman of the municipal board. After full consideration of the matter, we find that the above mentioned statements are not false, and they relate to the public character of the petitioner, and not to his personal character or conduct as contemplated by paragraph 4, part I of schedule V, of the electoral rules.

The statement regarding the opening of the meat shop in Mohalla Bazaria is, however, not false. There is abundant evidence on the record to show that a meat shop was sanctioned by the municipal board to be opened in Mohalla Bazaria. It seems to us wrong for the petitioner to assert that the respondent published that the petitioner got the meat shop opened. On perusing the leaflet we find that the petitioner has not been made personally responsible for the opening of the meat shop, but that during the tenure of his office as chairman the meat shop was permitted to be opened by the municipal board.

Another false statement was the publication by the respondent of the alleged withdrawal of the petitioner. Evidence proved that one Tilakdhari Singh, manager and agent of the respondent, sent several identical telegrams to seven other agents of the respondent at seven different places. The telegrams were as follows :—

“ Let our workers request Babu Sarup Narayan's supporters ‘ to vote for Raja Sahib in case he retires and his men demand support for Bindrahan ’.

“ Tilakdhari Singh in evidence stated that from certain conversation he inferred that the petitioner might withdraw from his candidature and accordingly he informed his workers by telegrams to secure for the respondent votes that would have gone to the petitioner.” The Commissioners state, “ We are not satisfied with the explanation of Tilakdhari Singh. There was no justification for him to send out the telegrams. It was incumbent upon him to verify the truth of the statement before he had published it. The proper and-reasonable course for him on learning of the alleged retirement of the petitioner was to make an inquiry at once from the petitioner, who was residing about four or five furlongs away from the respondent's house. If for some reason Tilakdhari Singh did not consider it proper to approach the petitioner for inquiry on this matter he should have satisfied himself from any other reliable source ”.

“ We cannot expect that Tilakdhari Singh would be giving out in plain language that the petitioner had retired, but he couched his telegrams in such words as to convey an inference to his agents to publish that the

petitioner had actually retired. We find from the numerous witnesses produced by the petitioner that as a matter of fact the respondent's agent took the meaning of the telegram in the sense that the petitioner had retired and widely circulated that rumour."

One Mashal Singh, it was proved, wrote out a receipt on November the 24th, 1926, charging ekka hire for his going out for giving information about the retirement of the petitioner. "The receipt distinctly shows that the instructions given to him were to proclaim that the petitioner would retire on the evening of November 25th, 1926. The receipt was written soon after the publication of the statement of the withdrawal and is a strong piece of evidence of such publication. We find that the statement published by Tilakdhari Singh, an agent of the respondent, that the petitioner had retired, was false and was calculated to prejudice the prospects of the petitioner's election."

The respondent is further charged with paying money to the Ramlila committees at Kanauj, Chhibramau and Kampil with the object of obtaining votes in his favour. The petitioner gave up the charge so far as it related to Kampil. It has been admitted by the respondent no. 1 that on his behalf, in 1926, Rs. 100 were paid to the Kanauj Ramlila committee and another donation of Rs. 51 with a sum of Rs. 25 in advance as subscription for the following year, was given to the Chhibramau Ramlila committee, but it is contended that they were given as harmless and innocent charities. It is sometimes difficult in connection with corrupt practices to state when charity ends and bribery begins. In *Plymouth* case (III O'M. & H., 109) Lush, J., said: "It is obvious that what are called charitable gifts may be nothing more than a specious and settled form of bribery, a pretext adopted to veil the corrupt practice of gaining or securing the votes of the recipients. And if this is found to be an object of the donor, it matters not under what pretext in what form, to what person, or through whose hands the gift may be bestowed or whether it has proved successful in gaining the desired object or not. On the other hand, a gift may purely be what it professes to be, the offspring of a purely benevolent impulse, and if this be its character, it matters not whether the recipient makes a good or bad use of it, or what its effects may be upon him. A motive originally pure cannot become corrupt by reason of a misuse of what was intended to be a benefit. All we can say is that a charitable gift, however injudicious it may be, is harmless in the eye of the law, whatever its effect may be upon the recipients, and certainly it is not bribery." In a latter case of *Salisbury* (IV O'M. & H., page 28) it has been observed that in each case the question arises whether the distribution of charity was done honestly, or whether it was done corruptly and that we must take the whole of the evidence into consideration, and enquire whether the governing principle in the mind of the man who makes such gifts was that he was doing

something with a view to corrupt the voters ; or whether he was doing something which was a mere act of kindness or charity.

In the cases before us we are inclined to think that the gifts made to the Ramlila committees were not made honestly by way of charity. It appears from the evidence that after the donation of Rs. 100 was given to the Kanauj Ramlila committee it was announced that the gift was intended for securing votes for the respondent as he had done meritorious work in the Council and had got a road constructed. The respondent had never before given any donation to the Kanauj Ramlila committee. He gave this donation during the election campaign and this generosity cannot be the outcome of any other object but to gain voters for himself.

As sum of Rs. 51 was given by Kundan Singh as donation in 1926 to the Chhibramau Ramlila committee and Rs. 25 were given in advance for the next year. In this case, too, we find that never before any donation was given to the Chhibramau Ramlila committee. Further, we notice that Rs. 25 were paid in advance as donation for the next year. Such generosity is rather unusual. We do not think that the donations were given with the object of popularizing the respondent or by way of charity ; but they were mainly with the object of influencing the election. Accordingly we find that the petitioner has succeeded in establishing that the respondent is guilty of corrupt practice of bribery by his agent Kundan Singh.

A riot took place in the city of Farrukhabad between the Hindus and the Muhammadans. Some Hindus were arrested and put in the lock-up. It appears that some Hindu citizens of Farrukhabad collected subscriptions to the extent of about Rs. 22,000 for the defence of the case. It is alleged by the petitioner that the respondent subscribed Rs. 500 for the defence of the case and paid Rs. 50 for feeding the under-trial Hindu prisoners.

It is admitted by the respondent that he gave Rs. 50 for the feeding of the under-trial Hindu prisoners of the riot case. In our opinion, the giving of such a small sum of money cannot be said to have been made with the object of influencing voters. A calamity had fallen on some of the Hindus and a man of the respondent's position must contribute.

The remarks of Mr. Baron Pollock in the *St. George's Division* case (5 O'M. & H., page 96) may profitably be cited here. In that case an attempt was made by the local authorities to prevent persons placing stalls on the footways in the metropolitan area. The coster-mongers, who were largely represented in the constituency became alarmed, and a meeting was held at which a defence union was formed. The respondent took the chair, and subscribed five guineas to the funds of the union.

As to this, Baron Pollock said " It seems to us impossible to consider this subscription of five guineas as a bribe. If ever there was an occasion

where a member for a borough or a candidate would be justified in assisting a body of persons living in the borough to maintain their just rights, it seems to us that this was the case. If the conviction had been upheld, many hundreds of persons earning an honest livelihood by the sale of goods in the streets in various parts of London would have been compelled to find some other means of maintaining themselves; and we think it is a perfectly legitimate thing for a candidate to lend assistance to a body of poor people in the constituency he seeks to represent, at a time when they may have reason to apprehend that legal proceedings will be taken against them, and it may become necessary for them to raise funds to defend their just rights. In our opinion there is a complete absence of any suspicion of corrupt motive." We agree with this view.

We therefore, decide this issue against the petitioner.

The last charge of bribery was that an agent of the respondent named Thakur Tilak Singh offered a piece of land to one Maiku of Umrapur in order to secure his vote. It was admitted that Tilak Singh was canvassing for the respondent. "He was thus a *de facto* agent of the respondent", who never repudiated his actions and adopted him as his agent.

The first point is whether Tilak Singh was an agent of the respondent. He has been examined by the respondent. He admits that he had asked a number of persons to vote for the respondent, that he had been to the villages in the neighbourhood of his village for asking voters to vote for the respondent no. 1 and explained to the tenants the services he (respondent no. 1) had rendered, and that he was the polling agent of the respondent no. 1 at the Talgram polling station. He clearly admits in cross-examination that he was canvassing for the respondent to his knowledge in the election of 1926. He was thus a *de facto* agent of the respondent who never repudiated his actions and adopted him as his agent. It is true that there is no direct proof of his actual appointment as an agent, but the law of agency in election goes much further than the ordinary law of principal and agent. Where there is no express appointment, the agency must be inferred from facts. We find that Tilak Singh had close connection with the respondent and was in fact canvassing for the respondent to his knowledge and acted as his polling agent. We therefore have no hesitation in holding that Tilak Singh was an agent of the respondent.

The next point for determination is whether Tilak Singh offered a piece of land to Maiku of Umrapur in order that he might vote and secure votes for the respondent. Tilak Singh admits in his deposition before us that he promised Maiku to have the land given to him by the respondent if he continued canvassing for him. A document was exhibited which was a report by Tilak Singh, as an honorary magistrate in connection with an application for the transfer of a case pending in his

court, and in it he writes that he promised to have a piece of land given by the respondent to Maiku on condition that Maiku tried his best to secure all the Kisan votes of the neighbouring villages for the respondent. We, therefore, feel no hesitation in coming to the conclusion that Tilak Singh promised to have a piece of land given to Maiku from the respondent on condition that the former tried to secure votes for the latter.

It has been urged on behalf of the respondent that the offer of the piece of land to Maiku was a remuneration for his canvassing for the respondent and not a bribe. We do not agree with this argument. The employment of Maiku was not that of a paid canvasser. He was asked to exercise his influence among the Kisan voters, because he had influence among them. It has come out in the evidence of Tilak Singh that he knew that Maiku was a man of influence among the tenants, and that by employing him to canvass for the respondent the latter would derive benefit. There is thus an introduction of an unfair element in the employment of Maiku and the remuneration offered to him was illegal. In our view, the offer of land was with a corrupt motive for Maiku to give and procure votes, and was an act of bribery as defined in paragraph 1, part I of schedule V. In *Bareilly City* case (see page 127) it has been held that the withdrawal of a criminal case as a reward to a person for recording his vote and procuring votes for a candidate was an act of bribery.

We therefore, hold that the respondent is guilty of the offence of bribery by his agent Tilak Singh under part I of schedule V.

Considerable discussion took place regarding the return of the respondent's election expenses which were impugned by the petitioner. It was urged on behalf of the respondent that the election tribunal had no jurisdiction to go into the question of the falsity of or an irregular return of election expenses. That any falsity or irregularity in the return was not a corrupt practice as defined by the rules and it could not therefore avoid an election. Lastly, that only those items in the return could be considered which are specifically mentioned in the particulars.

On the question of jurisdiction the Commissioners held that they had jurisdiction.

"Rule 5(4) lays down that the disqualification of an elected member is to arise when the return lodged is found, either by the Commissioners holding an enquiry into the election or by a magistrate in a judicial proceeding, to be false in any material particular. Now, how can the Commissioners find a thing unless they enquire into it, and how can they enquire into it unless they have jurisdiction to do so? The intention of the law is, therefore, clear that the election Commissioners have the jurisdiction to go into the question of correctness or irregularity of the return of election expenses. This view of law has found favour in the

*Attock*¹ case. In that case it was contended that the question of falsity of the return of election expenses could not be gone into by the election court. The learned Commissioners dealing with this point remarked that : ' As regards the first of the arguments for the petitioner it is true that there is no specific provision under which we can report that an election should be declared void on the ground that a false return of election expenses has been made, but such an election could be avoided by a declaration, under rule 23(1) present rule 25, that the seat of an elected person is vacant by reason of ineligibility arising out of the application of rule 5(4). Unless the question of falsity of return is inquired into by this Commission, the only means by which the provisions of rule 5(4) could become effective is an inquiry by a magistrate in a judicial proceeding. We do not consider that it would be right for us to leave such a matter to await the possible inauguration of judicial proceedings before a magistrate, and we look upon it as our duty to inquire into the question of this return ; this question has come before us in the exercise of our powers under section 34 (2) (a) [present rule 36(2)] under which all applications and proceedings in connection with the trial of a petition are to be dealt with and held by us. We think that the wording used in rule 5(4) contemplates our inquiring into the matter now sought to be brought before us, and we find that under section 5 of the Indian Election Offences and Inquiries Act (XXXIX of 1920) we are empowered to summon and examine of our own motion any person whose evidence appears to us to be material.' In our opinion, the Commissioners have laid down the correct view of law. The law cannot mean anything else, otherwise the use of the words ' by Commissioners ' in rule 5(4) would be meaningless. We find that in *Amritsar City* (see page 91) and in *Ferozepur* (see page 374) the question of the falsity or otherwise of the return of election expenses was raised and considered. If the Commissioners had no jurisdiction to entertain this matter, they would not have entered into it."

Regarding the question whether the filing of a false return is a corrupt practice, we find that it is not included among the corrupt practices enumerated in schedule V ; it is an illegal practice. In *Attock* case, it has been observed that lodging a false return of election expenses is not a corrupt practice. It will become a corrupt practice under schedule V, rule 5 when the Governor-General in Council issues a notification under rule 20 of the electoral rules.

As regards the question whether the lodging of a false return avoids the election, we find that it cannot be so under rule 44, but the effect of our finding that the return is false will be that the seat will become liable to vacation under rule 25.

¹ Not reprinted in this volume. It will be found in volume I, Indian Election Petitions, page 6.

The last objection of the respondent no. 1 regarding the return of expenses is that only the particulars specifically stated in the petition, in respect of which it is said that the return is false, should be enquired into and no other. In support of this view reliance has been placed on the *Hartlepool* case (6 O'M. & H., page 7), where it has been observed that matters which have been discovered in the course of the case but not charged in the particulars should not be taken notice of. In our opinion, we should be careful in applying the provisions of the English law to Indian cases. It has been remarked in the *Lahore* case (see page 473) that "it may be true that Indian Election Law is based on English Election Statutes, but it differs from English law widely in numerous particulars and should be regarded as a separate *corpus*, the Indian Legislators having adopted some and discarded others of the English Election provisions. It seems to us that the Indian Legislature intended to make their statutory provisions complete in themselves, and there is nothing whatever to indicate that there was any intention that the Indian courts should administer English Common Law provisions." In England falsity of the return of election expenses is by itself a statutory corrupt practice. (*Vide* Hugh Fraser's Law of Parliamentary Elections and Election Petitions, page 138, and Ward's Practice at Elections, page 126). In India as we have said above, it is not a corrupt practice under the rule; it is only a non-compliance with the rules and the mandatory provisions of law; but it entails disqualification and the consequent vacation of the seat. It is an illegality as distinguished from a corrupt practice. In England it is both a corrupt practice and an illegality. The Indian Legislature has adopted only a part of the English law that makes the falsity of the return of election expenses an illegality and rejected the other part of it that makes it a corrupt practice also. Until a maximum is fixed by the Governor-General, it is only an illegal practice.

Let us now consider what particulars are required to be stated in the petition. Rule 33(1) provides that the petition shall contain a statement in concise form of the material facts on which the petitioner relies. Clause 2 of the rule lays down that the petition shall be accompanied by a list setting forth full particulars of any corrupt practice which the petitioner alleges. We thus observe that full particulars of a corrupt practice are required to be set forth and not of any illegality or non-compliance, or breach of the rules or regulations, or any defect in the procedure. It is, therefore, not necessary that the particulars of a false return should be given in the petition. The return of election expenses is a document of the respondent and is, or should have been, prepared from properly kept accounts. There is nothing easier for an election-agent, who has honestly kept the accounts, than to repudiate any charge on the ground of falsity by producing his account-books and

satisfying the court that he has been honest. The object of the particulars is only to prevent the other party from being taken by surprise. If the respondent has been honest, and has not incurred any expenditure contrary to law, and has kept a regular account of all expenses lawfully incurred, he could at once place his account-books before the court to show that nothing was wrong. The respondent is therefore not taken by surprise if definite particulars are not stated in the petition in respect of which it is said that the return was false.

The Commissioners found that the return of election expenses lodged by the respondent was false in material particulars because it did not disclose the description of payees.

“The omission of the description of payees from the return of election expenses cannot be treated lightly. In *Amritsar* case (see page 92) it has been remarked that ‘The election expenses afford a useful check on the methods employed in the conduct and management of an election, and the matter cannot be treated lightly. It has been recently held in England that an election court might avoid an election if the return of expenses has been carelessly prepared, even if no corrupt intention is proved.’

“When the description of payees is omitted, it is impossible to find out to whom the money was really paid, as there are many persons of one name. It is clear that the description of payees has been omitted wilfully in order to conceal to whom the money was actually paid and make it not possible for any one to find out as to who were the persons who were really working for the respondent and on whom the money was actually spent. If, the omission of the description of payees was merely accidental, nothing was easier for the respondent than to file the regular account-books, if any kept, and to satisfy us that the omission of the description was only accidental; but no such attempt was made. No doubt, therefore, is left on our mind that the accounts were either not kept, or were kept in an irregular manner and contained illegal expenditures. The omission of description is a serious irregularity and cannot be ignored, as it would open the gates of fraud.”

One Ram Din was paid Rs. 20 by the respondent for going to Fatehgarh to call on an individual and to persuade him not to work against the respondent. The Commissioners found that this payment was clearly an expenditure in connection with the election and should have found a place in the return.

“The second item is regarding the petrol supplied by the respondent to the cars borrowed on the election day for bringing voters to and taking them away from the polling booth. Drigpal Singh is the private secretary of the respondent. He stated that the petrol used in motor-cars borrowed for conveying the voters to and from the election booths was supplied by the respondent. The price of petrol thus supplied is not

mentioned in the return of election expenses. The question is whether such an expense should be entered in the return. Hammond in his 'Indian Candidate and Returning Officer' at page 162 says that 'Any expenditure he (candidate) incurs on such (borrowed) motor-cars should be shown in his election expenses.' We agree with this view.

The Commissioners found that "certain men were salaried servants of the respondent, but that one of them, the manager, exclusively worked for thirty days while two others in addition to their own duties as servants of the respondent, also worked for him in the election. Their salaries or part-salaries for working in the election have not been shown in the return. The point for determination is whether they should have been recorded in the return. It has been contended on behalf of the respondent that Tilak Dhari Singh, Kundan Singh and Drigpal Singh were respondent's servants and were paid nothing extra for doing the work and, therefore, their ordinary salaries need not have been shown in the return of election expenses.

"In our opinion, all expenses incurred in connection with the election ought to have been shown in the return. It is an admitted fact that Tilak Dhari Singh exclusively worked for 30 days in connection with the election and did not do any other private work of the respondent. The remuneration paid for those 30 days cannot be held to have been paid to him as his salary as a manager. The payment must be as a reward or remuneration for his working in the election. Likewise the part-salaries of Kundan Singh and Drigpal Singh for the periods they worked in connection with the election should have been shown in the return. It has been said in the *Amritsar City* case, (see page 90) that 'We think the respondent ought to have shown in his return all expenses in connection with his election, big or small, and the explanation that certain articles were taken from respondent's shop or house cannot be considered satisfactory. We also consider that if any men in the service of the respondent were put on election work, their wages for the period should have been shown in the return'. In the *Hartlepool* case (O'M. & H., vol. 6, page 6) Mr. Justice Phillimore said 'I am certainly inclined to think that if a business man takes his business clerks and employs them for election work which, if he had not business clerks, would be normally done by paid clerks, he ought to return their salaries as part of his expenses; otherwise, a rich man, and above all a large employer, has a very considerable advantage over other candidates. The maximum limit of expenditure being equal for both, he can attribute to other matters than clerks a very much larger sum than his rival would be able to attribute'. In our case no question of the maximum limit of expenditure arises; but the principle regarding the inclusion of the salaries of the servants applies equally, inasmuch as the return filed should be correct and should disclose all expenses incurred in furtherance

of the election by whomsoever. The same view has been taken in the *Amritsar City* case (see page 92). It has been remarked that 'it is true that no maximum has yet been prescribed in India for the expenses which can be incurred by a candidate. But the absence of such a maximum does not relieve a candidate from the necessity of compliance with the rule'. In our opinion, the salaries of Tilak Dhari Singh, Kundan Singh and Drigpal Singh for the period they worked in connection with the election of the respondent no. 1 should have been shown in the return.

"The last item pressed before us in connection with the return of election expenses is the sums of money paid by Kundan Singh to the Ramlila committees of Kanauj and Chhibramau. We have already held that the payments were not lawful expenses in connection with the election; but were given as bribes for inducing electors to vote for the respondent. Such sums of money need not have been shown in the return.

"We, therefore, find that the return of election expenses lodged by the respondent no. 1 is false in the material particulars specified above and is not in the prescribed form, inasmuch as it does not disclose the description of the payees.

"The petitioner has prayed for a declaration that he was duly elected, inasmuch as he secured the highest number of votes next to the respondent. The total number of voters in the Farrukhabad District non-Muhammadian rural constituency was 24,298. There were three candidates for the election, namely, the petitioner and the two respondents. The respondent obtained 11,119 votes, the petitioner 3,955 and the respondent no. 1 21,840. We have found that the charges of corrupt practices levelled against the respondent no. 1 have been brought home against him so as to render his election void; but it cannot be said with certainty that the petitioner would have been elected if the respondent no. 1 had been out of the contest. The votes given to the respondent no. 1 cannot be treated to have been merely thrown away. The result is that a fresh election will be necessary."

The Commissioners found that the recriminatory petition had failed. There was not sufficient evidence to prove the distribution of sweets to the voters, and in the two cases of undue influence they found that the evidence was insufficient to establish the charge, while in another case no specific mention was made of the person threatened and they "declined to take notice of a general charge".

CASE No. XLVI
Ferozepur (M.R.) 1924
(PUNJAB LEGISLATIVE COUNCIL.)

PIR AKBAR ALI *Petitioner,*

versus

CHAUDHRI NAJIB-UD-DIN *Respondent.*

A beneficial false statement regarding a candidate does not come within the definition of the corrupt practice.

A "Fatwa" directed against the petitioner's election was held not to transgress the limits of legitimate advice.

It is necessary to prove that a statement was published by the candidate or his agent, and the publicity given must be such as to affect an "appreciable number of the voters".

THE petition included charges of bribery, the publication of false statements, personation and undue influence. As regards the first three the Commissioners found that in only two cases had personation been proved, but it was not proved that these were procured or abetted by the respondent or his agents. "These cases are, therefore, not sufficient to avoid the election. Their effect is only to reduce the number of votes for the respondent by two; but as the respondent had a majority of 377 votes, the result of the election cannot obviously be affected".

The charges of bribery and publication of false statements were not established. The Commissioners report "The false statement is alleged to have been made with respect to the conduct of the respondent in order to raise him in the estimation of a certain class of (anti-Government) voters and thus *improve* and *not to prejudice* his prospects. Consequently, the alleged statement cannot fall within the above definition. The law in England in this connection appears to be somewhat different. There, any false statement made 'for the purpose of affecting the return of any candidate' is classed as an 'illegal practice', and the definition would seem to include 'beneficial as well as prejudicial' statements [*vide* section I of 58 and 59, Vict. C. 40, and Rogers on Elections, volume II (19th edition), pages 557-58]. But, for some reason or other, a different wording has been adopted in India. It is, no doubt, possible that a beneficial false statement in favour of a candidate might be as harmful to his rival, as a false statement about the rival himself. However, we must take the definition as it stands, and we are constrained to hold that it cannot bear the interpretation sought to be put upon it by the petitioner."

The important issue in the case was the charge of undue influence by distribution of copies of the "Fatwa" and the preaching by Maulvis.

The "Fatwa" is a declaration by several Ulemas of different places that the followers of Mirza Ghulam Ahmed of Qadian, who are known as Mirzais or Ahmediyas, are not true Musalmans and cannot be the representatives of Musalmans. The petitioner is a Mirzai and his allegation is that this "Fatwa" was obtained and circulated by the respondent to prejudice his election. He has also alleged that certain Maulvis were preaching at the polling stations to the same effect as the "Fatwas". The respondent totally denies that the "Fatwa" was obtained or circulated by him. He has also produced evidence to the effect that, as a matter of fact, no copies of any "Fatwa" were distributed at the polling stations, as alleged by the petitioner, nor was there any preaching by Maulvis.

There is a considerable amount of oral evidence produced on the point by both sides. The oral evidence with reference to the "Fatwa" and the preaching by the Maulvis is practically the same, and the allegations of the petitioner with reference to both will stand or fall to-

gether. The oral evidence as regards the exact words used by the Maulvis is rather vague and unsatisfactory, while the contents of the "Fatwa" are definitely known and the case relating to it may be said to stand on a better footing in this respect. If the evidence relating to the "Fatwa" fails to establish the charge of "undue influence" the evidence relating to the preaching by the Maulvis must also fail. It will be, therefore, sufficient to discuss the evidence with special reference to the "Fatwa" only.

The "Fatwa" consists of the opinions of eight Ulemas belonging to different places in the Punjab and is, as already stated, to the effect that Mirzais cannot be representatives of Musalmans. One of the Ulemas (Habib-ul-Rahman) says that Mirzais are inimical to the interests of Islams and that, therefore, it is not lawful ("jaiz") to send a Mirzai as a representative of Musalmans. Another Ulema, Asghar Ali, Professor, Islamia College, says that Mirzais have no concern with Muhammadans, nor have Muhammadans any concern with Mirzais, and hence Mirzais cannot be representatives of Musalmans. The others do not give any specific reasons in support of their opinion that Mirzais cannot be representatives of Musalmans. At the end of the "Fatwa", it is mentioned that Pir Akbar Ali (the petitioner), who was a candidate for the Ferozepur Muhammadan rural constituency, is a Mirzai. The "Fatwa" is signed by Muhammad Khan Mubaligh, of Anjuman Khuddam-ul-Sufia.

It will be clear from the above that the "Fatwa" was directed against the petitioner's election, and the only points that need determination are :—

- (i) Was the "Fatwa" obtained and circulated by respondent or his agents ?
- (ii) Did it exercise or constitute an attempt to exercise "undue influence" on the voters ?
- (iii) How is the election affected by the "Fatwa" ?

The "Fatwa" was printed at the Ganpati Press, Moga. The petitioner called the printer and proprietor of the press, but their evidence only shows that a person called Muhammad Khan got the "Fatwa" printed. According to petitioner's own evidence, one Muhammad Khan Mubaligh (presumably the signatory of the "Fatwa") was reading the "Fatwa" and preaching at Malout on the polling day. But this Muhammad Khan was not produced as a witness and no attempt has been made to prove independently that he was acting under the instructions of the respondent. Abdul Aziz has deposed that Muhammad Khan was with the relations of the respondent when he distributed copies of the "Fatwa" and preached to the same effect at Malout. But Abdul Aziz is the only witness who has referred to Muhammad Khan Mubaligh. This witness came to Lahore at his own expense to give evidence and is on his own admission a friend of the petitioner. We do not consider this man's statement, by itself to be sufficient to prove

that Muhammad Khan Mubaligh was acting with the connivance of the respondent or his agents,—if not under their instructions.

Out of the Ulemas, whose opinions are embodied in the “Fatwa”, only one has been produced as a witness, viz. M. Asghar Ali Ruhi, Professor, Islamia College, Lahore. He deposes that two persons from Amritsar, of whom he can give no further details, got the opinion from him. There is no other evidence on the record to show who obtained the “Fatwa” and got it printed, and the point remains obscure. The respondent was no doubt interested in obtaining a “Fatwa”. But this fact, by itself, will not justify the conclusion that he did so. For, it is by no means improbable that some enemy of Mirzais or of the petitioner in particular may have got the “Fatwa” with a view to defeat his election. On the evidence, as it stands, it must be held that the petitioner has failed to prove that the “Fatwa” was obtained or printed by the respondent or by his agents, as alleged by him.

The petitioner has produced several witnesses who depose that copies of the “Fatwa” were distributed by the respondent’s agents or relations at different places, and in some places, in the presence of the respondent and his election agents. At Zira and Moga, copies are said to have been distributed by Said-ud-Din, a brother-in-law of the respondent. Chaudhri Badr-ud-Din, election agent is said to have been present at Zira and respondent himself at Moga. At Dharmkot, the “Fatwas” are said to have been distributed by Chaudhri Badr-ud-Din. At Malout, copies are said to have been distributed in the presence of Bahadur Khan and Abdullah Khan, uncles of the respondent. But almost all the witnesses, who have deposed to these facts, are interested—being admittedly agents, relations or friends of the petitioner. There is not a single respectable and disinterested witness whose testimony on the point could be safely accepted. On the other hand, the respondent has produced a number of witnesses, who have totally denied that any copies of “Fatwa” were distributed at the above places. Some of these witnesses are also interested, but most of them are lambardars, safed-poshes, etc. and *prima facie* there is no reason whatever for attaching more importance to the petitioner’s evidence on the point than that of the respondent. We feel great hesitation in accepting the petitioner’s evidence also owing to the fact that there was a suspicious lack of particulars with respect to this charge in the petition. The petitioner stated only in general terms in the petition that the respondent and his agents obtained and distributed copies of the “Fatwa”, and even when he was asked to supply further and better particulars, he was unable to supply any details with respect to the charge of “undue influence”, though he did give a number of details with respect to the other charges. The petitioner has himself gone into the witness box and now deposed that he was present at Zira on the polling day and that a copy of the

"Fatwa" was actually given to him by Said-ud-Din himself. His agents have also given similar details about other places. If the petitioner and his agents knew all these details, it is indeed difficult to see why these particulars were not given at the very outset or at any rate when they were asked for. We also find it difficult to believe that the petitioner or his agents (especially the petitioner, who is himself a lawyer) would have failed to bring the fact to the notice of the presiding officers, if copies of the "Fatwa" were openly distributed at the polling stations in the manner now alleged. After carefully weighing the evidence on both sides, and the other circumstances referred to above, we are unable to place any reliance on the petitioner's evidence as regards the distribution of copies of the "Fatwa", by the agents or relations of the respondent.

One of the contentions of the respondent with respect to this charge was that the "Fatwa" does not constitute any attempt to exercise "undue influence" at all, as it merely expresses the opinion that a Mirzai is not a fit person to represent Musalmans. There is, we think, considerable force in this contention. The definition of "undue influence", as given in schedule V of the electoral rules of 1913, is no doubt very wide in its terms and includes "any direct or indirect attempt to interfere with the free exercise of a voter's electoral right". But this cannot be taken to shut out even legitimate canvassing. In England, the right of the clergy to exercise their influence within certain limits is well established. The limits are clearly defined in the *Longford and Galway* cases (see 2 O'M. & H., 16 and 1 O'M. & H., 305). In the *South Meath* case O'Brien, J., remarked that the rule of law, as laid down in the *Longford* case, is, "in substance, this, that it is the undoubted right of the clergy to canvass and induce persons to vote in a particular way, but that it is not lawful to declare it to be a sin to vote in a different manner or to threaten to refuse the sacraments to a person for so doing" (4 O'M. & H. at 132). The explanation given in clause (b) under the definition of "undue influence" suggests that the rule is not intended to be different in India. The definition of "undue influence" given in the electoral rules of 1920 has been, no doubt, modified, and spiritual undue influence is not now restricted to "inducing a person to believe that he will be the object of divine displeasure or spiritual censure". But the "explanation" may be fairly taken to indicate the nature, if not the scope of the spiritual undue influence contemplated by the rule. In the present instance, the "Fatwa" merely says that Mirzais have no concern with Musalmans, that they are inimical to the interests of Islam and that they cannot be the representatives of Musalmans. It does not declare it to be a sin to vote for Mirzais, nor is there any threat held out to those who will vote for Mirzais. Habib-ul-Rahman, one of the Maulvis, whose opinions are given in the "Fatwa", says that it is not "lawful" ("jais") to send a Mirzai as a representative of the Musalmans, but the reason he gives for his

opinion is that Mirzais are inimical to the interests of Islam. It was argued by the petitioner that this is or at least would be construed to be tantamount to a declaration that it is sinful to send a Mirzai as representative. But no evidence has been produced before us to show that the use of the word "jais" would convey this meaning. There is no evidence, moreover, to show that the Ulemas, whose opinions are given, exercise any influence amongst the voters of the Ferozepur district. Asghar Ali, the only Ulema, who was produced as a witness, is only a professor in a college. There is no reason to think that he would exercise any such influence as a spiritual leader, as for example, a Pir, or that his word would be taken as a command. Several of petitioner's own witnesses have stated that they voted for him in spite of the "Fatwa". Undue influence must be established by evidence and cannot be arrived at by conjecture (2 O'M. & H., 200, and *Lahore City* case (see page 471). It must be remarked further that we are dealing here with a case of representation of a Muhammadan constituency and it cannot be said that religion had nothing to do with the election. According to the electoral rules, only a Muhammadan can be elected to represent a Muhammadan constituency. The petitioner's own evidence shows that Mirzais look upon other Muhammadans as "kaffars" (see P.W. 4 who calls himself a Maulvi). It is not unnatural under the circumstances, that non-Mirzais should look upon Mirzais in the same way. We do not see why it should not be open to non-Mirzai Maulvis to say to non-Mirzais voters that Mirzais are opposed to their interests and cannot be their proper representatives. The point is not perhaps free from difficulty but on the evidence, as it stands on the record, we are not satisfied that the contents of the "Fatwa" transgress the limits of legitimate advice and constitute "undue influence".

However, even if the "Fatwa" were supposed for the sake of argument to constitute "undue influence" within the definition of the term in India, the result of the election will not be affected in the present case. As "agency" is not established, the case does not fall under clause (b) of rule 44 of the electoral rules. As regards clause (d) of the same rule, there is no evidence to show that the election has not been a "free election" owing to a large number of cases in which undue influence has been exercised. We have already disbelieved the evidence as regards the distribution of the copies of the "Fatwa" at the polling stations. The evidence of the printer Hardit Singh shows that only 200 copies were printed. The number of voters was over 2,000. If there was any intention to circulate the "Fatwa" widely, probably a large number of copies would have been printed. The petitioner's witnesses have mentioned certain voters as having been affected by the "Fatwa". But the voters themselves were not produced, with the exception of one person, who is a near relation of the petitioner. On the other hand,

out of the persons, who were supposed to have been affected, some have been produced by the respondent and have clearly stated that they saw no "Fatwa" and they voted for the respondent, because they considered him to be a better candidate. Over 2,000 voters voted at the election. Respondent had a majority of 377, as already stated. There is no evidence to show that any appreciable number of voters were really affected by the "Fatwa" and there is, therefore, no reason to suppose that the "election has not been free". The result of the election is, therefore, not affected in any case.

We have now to deal with the recriminatory petition of the respondent. This was framed more or less on the same lines as the petition itself. There were a number of charges of corrupt practices, viz. bribery, undue influence, personation, publication of false statement, treating and use of hired conveyances to take voters to the polling station and the correctness of the return of expenses filed by the petitioner was also challenged. But no serious attempt was made to substantiate these charges. The charge of personation was given up. Out of the others, there is not a title of evidence to support the charges detailed in paragraphs 2, 6 and 7. As regards "bribery", there is practically nothing beyond the statement of a solitary witness that certain voters of the village Chhotian Kalan were paid Rs. 5 each in consideration of their votes. A couple of witnesses have stated that the petitioner, who is a legal adviser to the Mamdot State, threatened the lessees of that State in order to secure their votes. We consider this evidence to be wholly inadequate to prove the charges. As regards treating and the use of hired conveyances there is a certain amount of oral evidence. One Muhammad Beg who is alleged to have been an agent of the petitioner, has deposed that he took several voters in hired tum-tums to the polling station, that the hire was paid from the petitioner's funds. Ata Muhammad Khan, extra naib-tahsildar and Ismail, tum-tum driver, have supported the above statement, and Ata Muhammad Khan had also deposed that the voters were fed by the petitioner's agents. The petitioner has, on the other hand, produced Muhammad Husain Khan, Risaldar, one of the voters alleged to have been taken in Ismail's tum-tum, as his witness and he has contradicted the above witnesses. On the whole, the evidence produced does not seem to be sufficient to justify a finding against the petitioner. As regards the return of expenses, the respondent's evidence is of no better type than that of the petitioner and is altogether meagre. We consider respondent's evidence to be inadequate to establish any of his allegations and consequently the recriminatory charges also must fail.

As a result, we recommend that both the petition and the recriminatory counter-petition should be dismissed. In the circumstances, the parties should be left to bear their own costs.

CASE No. XLVII
Golaghat (N.-M.R.) 1924
(ASSAM LEGISLATIVE COUNCIL.)
•

SRIJUT TARA PRASAD *Petitioner,*

versus

RAI BAHADUR DEVI CHARAN BARUAH .. *Respondent.*

Rejection of nomination paper on ground of change of name of candidate without enquiry held to be improper.

Returning officer should enquire into question of age of candidate if so requested.

The name of a subdivision of a constituency is only necessary on a nomination paper, where separate serial numbers are assigned to the electors entered in each subdivision.

THE petitioner Srijut Tara Prasad was a candidate for election from the non-Muhammadian rural constituency of Golaghat to the Assam Legislative Council.

His nomination paper was duly presented to the returning officer Babu Jagat Chandra Das on the 27th of October, 1923. It was rejected by him on the 29th of October, 1923. The order rejecting it is endorsed on the nomination paper as follows: "Rejected. It is found that the candidate's name as entered here is not in the electoral rolls. The name of the subdivision against the names of the candidate, proposer, and seconder is not given as required by the footnote. This is non-compliance with the provision of rule 11. Rejected under regulation 13 (1) (iii) and (iv)".

The present petition was filed on the 21st of December, 1923. In it the petitioner submits that his nomination was improperly rejected.

The question for decision is whether the returning officer was right in rejecting the nomination, and, if not, whether the result of the election has been materially affected by the improper refusal of the nomination.

In the nomination paper we find the number of the candidate in the electoral roll of the constituency in which he is registered as an elector is given as 6,312. But on turning to the electoral roll we find number 6,312 of the roll is Tara Prasad Barua. Hence the returning officer's finding that the candidate's name is not to be found in the electoral roll.

The petitioner has explained that he changed his name in August, 1923 from Tara Prasad Barua to Tara Prasad. This is corroborated by an entry on page 796 of the *Assam Gazette* of the 11th of August, 1923, in which it is directed that in a certain previous notification of the gazette "Srijut Tara Prasad" is to be read for "Srijut Tara Prasad Barua". We have taken evidence and satisfied ourselves that the candidate "Tara Prasad" is the individual who is entered in the electoral roll no. 6312 as "Tara Prasad Barua".

The candidate himself as well as the proposer and seconder were present at the scrutiny of the nomination paper but were not questioned as to the identity of the nominee which they could easily have established. In these circumstances we think that the nomination paper was improperly rejected on this ground.

We also think that the fact that the name of the subdivision is not given against the names of the candidate, proposer, and seconder in the nomination paper was not a proper ground for rejecting the nomination, inasmuch as the footnote to schedule III, referred to by the returning officer, only requires the entry of the subdivision in cases where the electoral roll is subdivided and separate serial numbers are assigned to the electors entered in each subdivision. In the present case there

was not such subdivision of the electoral roll, and the entry of the subdivision was not essential.

Finally, we have to consider whether the improper rejection of the nomination has materially affected the result of the election.

On this point it has been urged on behalf of the returned candidate Rai Bahadur Debi Charan Barua that, inasmuch as the nomination should have been rejected under electoral rule 5(f) on the ground that the candidate was under 25 years of age, the fact that the nomination was improperly rejected on other grounds has not materially affected the result of the election.

The evidence shows that the returned candidate objected at the time of the scrutiny of the nomination paper that the petitioner was not eligible for nomination as being under 25 years of age. But, instead of making any enquiry into the age of the candidate, it appears that the returning officer said he could not go behind the electoral roll which showed the age of the candidate to be 25. [Incidentally this would show that he accepted the identity of the candidate with no. 6312 of the electoral roll]. Now under regulation 12 (2) (a) it is laid down that "for the purposes of this regulation the production of any certified copy of an entry made in the electoral roll of any constituency shall be conclusive evidence of the right of any elector named in that entry to stand for election or to subscribe a nomination paper, as the case may be, unless it is proved that the candidate is disqualified under rule 5 or rule 6 or, as the case may be, that the proposer or seconder is disqualified under sub-rule (4) of rule 11". In the present case Rai Bahadur Debi Charan Barua offered to prove that the candidate was under 25 years of age and we think the returning officer should not have refused to enquire into the question of age. We have therefore considered all the evidence produced as to the age of the petitioner. He has produced his horoscope and we have examined Pandit Sri Khageswar Sarma, Bidyaratna who made it at the order of the petitioner's father Srijut Someswar Sarma whom we have also examined.

On the other hand, the returned candidate has produced the University calendar showing that the petitioner's age, as given to the University, was 17 years 10 months on the 1st of March, 1919. This would make his age about 22 years and 6 months on the date of the nomination, whereas, according to the horoscope (prepared according to the witness on the 24th of April, 1898, 6 or 7 days after his birth) he was about 25 years and 6 months of age when nominated. His age was first entered in the electoral roll as 22 years, but this was subsequently revised by an order of the registering officer Mr. H. Weightman, dated the 11th October, 1923, as follows: "Have seen Tara Prasad, his original horoscope, and the writer of it; I am satisfied that his age is 25 years and 6 months old. Under regulation 8 his age will be altered in the electoral

roll ". The petitioner's witnesses can only fix the date of his birth by a reference to the horoscope, and there is practically no corroborating evidence. Still we think that in the circumstances it was for the opposite party to show that the petitioner was, in fact, under 25 at the date of nomination. This the opposite party has been unable to do since we think the entry in the University calendar is not in itself sufficient, and we do not know who was responsible for the first entry of age in the electoral roll.

We therefore find that the petitioner was not disqualified for nomination, and that the returning officer was right in not rejecting his nomination under rule 5(f) on the ground of age. Inasmuch then as the returning officer improperly rejected the petitioner's nomination paper on the two grounds referred to in the petition, we hold that the returned candidate Rai Bahadur Debi Charan Barua has not been duly elected, and the election is therefore void. We recommend that costs be assessed at ten gold mohurs to be paid to the petitioner by Rai Bahadur Debi Charan Barua, the opposite party.

CASE No. XLVIII

Gurgaon *cum* Hissar (M.R.) 1924

(PUNJAB LEGISLATIVE COUNCIL.)

HAYAT KHAN *Petitioner,*

versus

SAHIB DAD KHAN *Respondent.*

Adjournment of enquiry refused as petitioner was held guilty of "gross negligence", and failed to comply with orders passed. Petition dismissed.

THE petitioner has called in question the election of the respondent on the ground of a number of corrupt practices alleged to have been committed by the respondent and certain other irregularities. The respondent denied the allegations of the petitioner and also put in a recriminatory statement against the petitioner. Issues were framed on the pleadings of the parties on 8th March, 1924, and the petitioner was ordered to produce his witnesses on the six days commencing with the 28th instant. As the petitioner propos'd to produce a large number of witnesses these days were set aside solely for his case. On the 27th March the petitioner was distinctly ordered to take out the summonses by Monday (1st April) to the senior Sub-Judge, Gurgaon, and pay the diet money there, and was also told that he would be held responsible for getting the service effected.

The petitioner has, however, entirely failed to comply with the above orders, with the result that not a single witness has been summoned and the petitioner is not in a position to produce any evidence during the week set apart for him. The petitioner did ~~not~~ deposit the process fees even till the 4th April. As regards the subsequent events the petitioner's allegations are as follows :—

On the 11th April the petitioner's counsel got the summonses and then sent them by registered post to the petitioner. The petitioner alleges that he did not receive the summonses till the 19th. On the 21st instant he handed over the summonses to a pleader at Gurgaon, named Mustaq Ahmad, for getting them issued, through the senior Sub-Judge. Petitioner left Gurgaon on the 21st instant. On the 26th instant he again went to Gurgaon and learnt that Mustaq Ahmad had put in an application or made a statement in the court of the senior Sub-Judge, Gurgaon, that there was some likelihood of a compromise, and that the processes need not issue as Farzand Ali and Abdul Majid, agents of the respondent, had told him (Mustaq Ahmad) that it had been settled that this court will be requested only to grant an adjournment (for the compromise). A telegram was then sent to respondent and respondent reached Gurgaon on the 26th instant. The respondent stated that he would consult his counsel as regards the question of adjournment. It was, however, too late by this time to get the processes served, and hence no steps were taken to effect service.

No affidavit was put in in support of the above allegations, when the case was called for hearing yesterday. Respondent denied these allegations on solemn affirmation. He stated that, although Farzand Ali was his agent, during the election days, he had ceased to be so, since then, and that Abdul Majid was not even known to him till he saw him on the 26th instant. He had never authorized these persons to enter into any negotiations with petitioner for a compromise. On the 25th instant,

he did get a telegram asking him to go to Gurgaon, and he accordingly went there. He was then told that a panchayat had been held at Nooh on the 24th instant, and that the panchayat desired that the case should be compromised. Another panchayat was held on the 26th instant and respondent stated before the panchayat that legally there could be no compromise in this case, but that the petitioner could withdraw, if he liked, and if he did so, he (the respondent) would not press for costs. The respondent never agreed to anything else.

The petitioner is, however, not prepared to withdraw and we have been requested by his counsel to grant an adjournment to enable him to produce his evidence. After carefully considering the facts and hearing both sides, we are of opinion that no sufficient cause has been shown by petitioner for granting an adjournment. The petitioner has been guilty of gross negligence in the matter throughout. He made no effort to get the summonses out promptly from this court and thereafter too there was considerable delay in taking the summonses to the senior Sub-Judge's court at Gurgaon. Petitioner's counsel then distinctly informed the Senior Sub-Judge not to issue processes as there was likelihood of a compromise. The petitioner or his counsel had no justification whatsoever for adopting this course when there was no certainty as regards the compromise. The petitioner did not care to approach us with a view to see if an adjournment could be granted. He knew full well that six days had been set apart solely for his case and that valuable time of this court was likely to be wasted, if no evidence was produced. He also ought to have known that he could not have obtained an adjournment as a matter of course, merely to enable him to continue his negotiations for a compromise.

It has been suggested that the respondent has practised fraud on the petitioner by giving him hopes of a compromise ; but there is absolutely nothing on the record to support this suggestion. Petitioner has not cared to file even an affidavit. Respondent has made a straightforward statement on solemn affirmation and we see no good reason to disbelieve it. We do not believe that there has been any fraud on the part of the respondent. The petitioner is not an ignorant man and he ought to have realized his responsibility in the matter.

The present inquiry is to be conducted as nearly as possible according to the provisions of the Civil Procedure Code (*vide* rule 37, Punjab electoral rules). The petitioner is not entitled to have any adjournment without showing sufficient cause (*cf.* O. 17, rule 1, Civil Procedure Code). For reasons given above, we think he has entirely failed to show any such cause, and we are, therefore, unable to grant a further adjournment to enable him to produce his evidence. The result is that petitioner's allegations against the respondent remain unsubstantiated and the petition

must, therefore, fail. We would accordingly, humbly advise His Excellency the Governor that the petition should be dismissed.

The respondent has not pressed the question of costs and the costs need not be heavy. The petitioner should pay Rs. 100 as costs to the respondent.

CASE No. XLIX

Habiganj South (N.-M.R.) 1924

(ASSAM LEGISLATIVE COUNCIL.)

BABU GAJENDRA CHANDRA CHAUDHURY AND SEVEN

OTHERS *Petitioners,*

versus

THE HON'BLE RAI P. C. DATTA BAHADUR .. *Respondent.*

Testimony of an accomplice requires the usual safeguards. The evidence must be of the same standard as would be required in a criminal prosecution.

False statements of facts, as distinct from opinion, discussed.

A minister, who in view of an approaching election, combines a visit to his constituents with a tour undertaken mainly for official purposes, in which he was accompanied by Government officials was held not to have used undue influence.

The expenditure in connection with such a tour need not be entered in the return of election expenses.

AGAINST the election of the respondent, who was Minister to the Government of Assam, a petition was presented on the 19th January, 1924 by eight electors of the Habiganj South constituency (N.-M.R.), the opposing candidate having died about a month after the election. The petition, which was very lengthy, contained charges of bribery, both by payments of money and by making promises, of the publication of false statements, intimidation, personation, of the issue by the respondent of a manifesto without the name and address of the printer and publisher and of the false declaration of the return of election expenses.¹

In respect of the charges of undue influence, it was contended that the hon'ble minister had taken advantage of his official position. It was also urged that there were certain irregularities and errors committed in connection with the conduct of the election.

As regards bribery and treating the Commissioners held that the evidence produced on behalf of the petitioners was inconsistent. They also took the view that the case was not one of the type in which the testimony of an accomplice, so notoriously unreliable as a rule, should be accepted without the usual safeguards. The report continues :—

What these safeguards are is well-settled (see Jenkins, C. J., in *R. vs. Lalit Mohan Chackerbutty*, I.L.R. 38 Cal. 559). There must be corroboration not only as to the details of the transaction but principally as to the identity of the accused—in this case Gopendra Chaudhury. To borrow the language of Campbell, J., in *R. vs. Chutterdharee Singh and others* (5 W.R. Cr. 59), “ Even when the general credibility of the story is confirmed by overwhelming evidence, it is very unsafe to convict without some corroborative evidence connecting the particular accused with the transaction ”. This, in fact, is the accepted meaning of the term “ material particulars ” occurring in section 114, illustration (b) of the Evidence Act, particulars relating not so much to the details of the transaction as to the identity of the accused.

In other words, reverting to the facts of the case before us, however true it may be that Dinonath took seven voters with him to the shop, that 5 ten-rupee notes passed, that Dinonath handed the money to Sonaton, that Sonaton subsequently played false, that there was a clamour in the village for a *bichar*, and so forth, all this is not “ material ” corroboration so far as Gopendra Choudhury is concerned. These details, even if correct, afford no guarantee that the witnesses in question have

¹ Note.—[The report of the Commissioners was published in the *Assam Gazette* (notification no. 485-L., dated the 8th August, 1924). The extremely lengthy discussion of the evidence is not reproduced, the report below, being confined to such extracts as deal with the more general aspects of the case and the

not falsely introduced Gopendra Choudhury's name into the transaction at the bidding of interested persons.

What corroboration is there then in the case of the allegation that it was Gopendra Choudhury who paid Rs. 50 to Dinonath? Attention has already been drawn to the fact that although Krishna Das and Motilal both state that Gopendra Choudhury paid the money, they differ about the preceding links; whereas Krishna Das asserts that Gopendra not only paid the money but also brought Dinonath's party to the shop and himself conducted the negotiations, Motilal says that it was only Dinonath that took the voters to the shop and negotiated with them. These details, telling, as they do, of the manner in which Gopendra Choudhury came into the transaction and therefore serving as links to connect him with it, are precisely amongst the "material particulars" of the Evidence Act; and as we have just seen, the two accomplices, so far from corroborating, contradict each other in respect of them.

The statements which the witnesses made to Babu Binayendranath Palit in December have already been mentioned. They are of no corroborative value, being merely the statements of the accomplices themselves, made at an earlier stage no doubt, but still, after they had got into touch with persons interested in this petition. Witness Ramesh Choudhury who, as will be seen later, is an active supporter of the petitioners and gave these witnesses advice and instruction in connection with their journey to Sylhet for this case, had been making inquiries about the Teliapara incident even before Binay Babu came to collect materials for the election petition. In other words, he had got into touch with the witnesses, whether directly or indirectly, even before Binay Babu's arrival.

There are reported cases in which it has been laid down that the previous statement of an accomplice, whether made at the trial or before the trial, and in whatever shape it comes before the court, is still only the statement of an accomplice and does not at all improve in value by repetition (see *R. vs. Malapa bin Kapana*, 11 Bom. H.C.R., 196; *R. vs. Bipin Biswas and others*, I.L.R. 10 Cal., 970; and *Sankaran Nair, J.*, in *R. vs. Nila Kanta*, I.L.R. 35 Mad., 247). If we take this extreme view, we must reject as entirely valueless the statements made by Krishna Das and Motilal before Binay Babu; they are of no corroborative force whatever. But without going so far, we may adopt the majority view taken in the *Madras* case of *Muther Kumara Swami Pillai vs. R.* (I.L.R. 35 Mad., 379), namely, that the former statement of an accomplice may sometimes be admitted by way of corroboration. "I do not think", observes Benson, J., in the above case, "there is anything in the Indian Evidence Act to exclude the evidence of accomplices from the plain and express rule in section 157, nor can it be suggested that 'corroborate' is used in section 157 in a different sense from that in which it is used in

illustration (b) to section 114. The former statement of an accomplice is therefore legally admissible to corroborate his testimony at the trial. In the great majority of cases, it would, no doubt, be found to be merely the repetition of tainted evidence, affording no ground for believing it to be true, and, therefore, adding nothing whatever to its value. On the other hand if there was evidence or even a suggestion put forward by the defence that the evidence given by the witness at the trial was the result of *recent influences* brought to bear upon him, it would be most important to be able to prove that the witness had made statements to the same effect as his evidence at the trial long before the influences relied on by the defence had been brought to bear upon him." The point to note in the present case is that the earlier statements, like the later, were made after the witnesses had come within the reach of outside influences. Taking therefore, even the most liberal view of the law we are unable to hold that the statements to Binay Babu add anything to the value of the statements in court. We have left out of account for the moment the point that Binay Babu's notes do not show what statement each separate witness made to him.

* * * * *

One other point remains to be noticed. It may be argued that this is a civil case and that rules of evidence peculiar to criminal law (such as, it may be said, the presumption attaching to accomplice testimony) should not be applied to civil proceedings in which a lower standard of proof suffices. Our answer is that whether a case is of a civil or criminal nature for this purpose does not depend on the nature of the tribunal which tries it, or the procedure by which it is tried, but on the nature of the issue. To go no further than the ordinary text-books, Kenny in his *Outlines of Criminal Law*, dealing with the proposition that a larger minimum of proof is necessary to support an accusation of crime than will suffice when the charge is of a civil nature, observes:—"It was formerly considered that this higher minimum was required on account of the peculiarities of criminal procedure, such, for instance, as the impossibility of a new trial, and (in those times) the refusal to allow felons to be defended by counsel and to allow any prisoners to give evidence; and consequently that it was required only in criminal tribunals. This view is still taken in America; but in England it is now generally held that the rule is founded on the very nature of the issue, and therefore applies without distinction of tribunal. Hence if arson be alleged as a defence by an insurance company when sued on a fire policy, or forgery as a defence by a person sued on a promissory note, it cannot be established in these civil actions by any less evidence than would suffice to justify a conviction in a criminal court." It is scarcely necessary to point out that the rules about accomplice testimony which are the same in

India as in England, occur in the book under the head of the minimum of proof required in criminal proceedings. The same author in commenting on the presumption of innocence citing *Williams vs. East India Company* (3 East 192), states that the rule holds good not merely in criminal trials but equally in every civil case where any allegation is made that a criminal act has been committed.

In the case before us, the allegation is that Gopendra committed a criminal offence, viz. that of bribery. The evidence produced must therefore be of the same standard as would be required in a criminal prosecution. We have found that it is not and we accordingly decide this sub-issue in favour of the respondent.

In the matter of the publication of false statements the issue was in the following terms :—

(a) Did a sub-agent of the respondent named Rai Sahib Joy Nath Nandi compose a song defamatory of the rival candidate Babu Harendra Chandra Singha and get it sung, thereby prejudicing the later's prospects ?

(b) If so did the song contain statements which were false and known to the aforesaid sub-agent to be false ?

As to the composition and publication of the song we have little doubt. But we are not convinced that it contained any statement which the Rai Sahib did not believe to be true or any statement reasonably calculated to prejudice the prospects of Harendra Babu's election. The portion of the song to which exception is taken in the election petition has been translated by the petitioners thus :—

“Promode (returned candidate), Kamini and Krishna Sundar are very good politicians. Giris Nag has a large sense of duty. Sinha (i.e. the rival candidate) is very terrible. O'h dear brethren the British Lion is our King ; if Sinha goes to the Council, there will be two Singhas (one British Lion and the other H. C. Sinha) in one Council and the result will not be a beneficial one. These two Lions (i.e. the British Lion and Sinha) will fight and the people will be helpless. Considering (them) troublesome they will form a combination and turn out the one (i.e. the Lion) of the country (i.e. H. C. Sinha).”

The only statement of fact contained in the above extract which can be said to refer to the rival candidate's personal character is “Sinha (the rival candidate) is very terrible”. It has been admitted by the petitioners' own witness Babu Mahendra Chandra Das that the late Babu Harendra Chandra Singha was of an uncompromising disposition and that he used to lose his temper perhaps more often than other pleaders. When Harendra Babu's nephew Benoy Babu was asked about Harendra Babu's temper, he replied that he found it difficult to answer the question and that it should be put to somebody else. These statements indicate sufficiently that temper was not Harendra Babu's strong point.

Rai Sahib Joy Nath Nandi has explained that what he meant by the phrase "very terrible" was that Babu Harendra Chandra Singha was of a very fierce temper. We cannot say that he had no reason for believing the statement to be true. Apart from this it seems to us that to describe a candidate as being "a very fierce lion" is not reasonably calculated to prejudice his prospects of election. The rest of the song is a statement of opinion rather than of fact and need not therefore be considered.

We accordingly decide this issue in favour of the respondent.

As regards the charges of undue influence brought against the Hon'ble Minister the Commissioners framed issue no. 5 as follows :—

" 5. (a) Did the respondent conduct his election campaign in the manner alleged in paragraphs 6, 7, and 13 of the election petition ?

If so, can he be said to have used undue influence to secure this election ? "

The paragraphs referred to in the issue are as follows :—

" 6. That the said returned candidate toured about throughout the entire constituency making his camps at Shaistaganj and Habiganj, between the dates 28th June to 5th July, 1923, 25th August to 24th September, 1923, 26th October to 30th November, 1923, and during his tour Government officials serving in the various departments under him accompanied him and that his prolonged stay within the jurisdiction of the said constituency attended with all the prestige and powers of his high official position has it is believed acted very prejudicially to the interests of the rival candidate.

" 7. That the said returned candidate, it is believed, considered it expedient to utilize the influence of his official position as Minister of Assam for the purposes of his candidature and while occasionally travelling in his railway saloon and in different places in his tour he was accompanied by his nephew and election agent, one Babu Dharmadas Dutt, M.A., B.L., and one Babu Khirode Chandra Dutt, B.L., Sub-Agent, and other influential men of the localities.

" 33. That the said returned candidate on the strength of his official position occupied the Circuit House at Habiganj and his agents Dharmadas Dutta, Khirod Chandra Datta, Suresh Chandra Palit, Aghur Chandra Ray and many candidates for appointments in the Government service occupied the Circuit House with him, and although the said returned candidate occupied the Circuit House from 28th June to 1st July, 1923 and canvassed for voters, and yet the expenditure incurred during that period has not been shown in the account. That the said returned candidate's stay in the Circuit House and that of the aforesaid people created an impression in the minds of the voters which greatly

affected the election inasmuch as the voters might think that the Government was in a manner supporting the candidature of the said returned candidate who was, then as now, the Minister of Assam."

Before coming to the specific allegations contained in the above paragraphs we may observe generally that the respondent was in an equivocal position during his election campaign. We are not aware of any rule requiring a Minister to resign office before offering himself as a candidate for re-election. We cannot therefore say that the respondent committed any irregularity in choosing to remain in office while conducting his election campaign. In the circumstances it was inevitable that he should, to a certain extent, combined canvassing with official work. It was also inevitable that whenever he went out canvassing he should be attended "with all the prestige and powers of his high official position". We do not see how he could leave these behind so long as he was Minister, any more than he could leave his own shadow behind. And as to the occupation of the Circuit House and the impression which it might have created in the minds of the voters that Government was supporting the candidature we may observe that in these days that impression is as likely as not to lose him popular support.

Turning now to the specific allegations on this subject, the only one on which evidence has been adduced is that relating to the respondent's tour between 28th June, 1923, and 5th July, 1923. The petitioners have sought to prove before us that this was a purely electioneering tour, with a little official work thrown in, in order to give it the appearance of an official tour. The respondent on the other hand claims that it was undertaken mainly for official work, and that incidentally he took advantage of the opportunity to inform his friends and relations in the locality of his desire to stand for re-election. The Deputy Director of Agriculture has been examined by the respondent for the purpose of proving the nature of the tour. From his evidence we find that as early as April or May, 1923, there were proposals for retrenchment in the Agricultural Department in this province. Witness went and saw the respondent in Shillong and had several discussions with him on the subject. The respondent apparently desired to carry out the proposals of the Bengal retrenchment committee and abolished all the Imperial posts as well as most of the demonstration staff. Till then the departmental policy had been to increase the demonstration staff. Witness explained to the respondent why the staff should not be reduced, but the respondent seemed sceptical of the claims of the department. Witness then suggested, that before coming to any conclusion the respondent should see for himself some of the department's farms and agricultural demonstrations. Witness further suggested that Bejura (in the Habiganj subdivision) was the place where the work of the department had made most progress.

We need not go into further details but we are satisfied that the respondent's tour to Bejura and the neighbourhood was undertaken mainly for the above purpose. It is clear to us from the Deputy Director's evidence, based on his tour diary, that from 30th June, 1923, to 4th July, 1923, he was with the respondent and that during that time the respondent did a good deal of official work in the way of seeing agricultural demonstrations, distributing prizes and certificates in connection with agricultural matters, inquiring into the need for *kula-azar* centres, inspecting schools, etc. Nor can it be said that the tour was not followed by any specific results. At least one useful reform seems to us to have owed its origin to this particular tour. We refer to the amalgamation of the Department of Agriculture with that of Co-operative Credit, which may be expected to enable the Agricultural department to work through co-operative societies instead of through a paid demonstration staff, thereby effecting economy without impairing efficiency. We cannot therefore hold that the tour was fruitless or that it was official only in name; useful official work was done and at least one tangible reform followed as the result. Although therefore the respondent may have done some canvassing during the tour in question, out of, so to speak, office hours, we cannot hold that it was not primarily an official tour. There was therefore nothing wrong in his being accompanied by various Government officials serving in the departments under him. We decide this issue in favour of the respondent.

As regards the declaration of election expenses the Commissioners framed the following issue :—

“Did the irregularities and errors detailed in paragraph 12, paragraph 17, paragraph 28 and paragraph 29 of the election petition occur and are they material or did they materially affect the result of the election ? ”

Paragraph 12 of the election petition alleges : (1) that vouchers for amounts of Rs. 5 or more have not been submitted with the return of election expenses ; (2) that 100 copies of the *Paridarsak* were distributed by the election agent and Babu Khired Chandra Datta, sub-agent, and the price of these 100 copies has not been shown in the return of expenses, (3) that the railway fares charged are incorrect.

As regards vouchers we find that there are some instances in which vouchers for amounts exceeding Rs. 5 have not been submitted. The explanation given on behalf of the respondent is that the money was spent on railway fares, etc., and that under schedule III of the electoral rules no vouchers for such items are required. Respondent has however overlooked the next clause in the same schedule which states that all sums paid for which no receipt is attached are to be set out in detail with dates of payment. This has not been done, e.g. items 3 to 10, pages 23-25 of the return. There has, therefore, been undoubtedly an irregularity.

But we do not think on this account that the return is false in any material particular.

As to the distribution of copies of the *Paridarsak* there is no evidence against the election agent. Khirod Babu, who was a sub-agent, admits, however, that he distributed the copies in order to show up certain persons mentioned in the paper and not for any purpose connected with this election. We have read the issue of the *Paridarsak* in question and we find that although a connection may be imagined between it and the election in dispute, the connection is so remote as to be negligible. We therefore find that there was no irregularity under this head.

Turning next to the railway fares shown in the return we regret to observe that it was not prepared with the care which we should have expected in a document whose correctness has to be certified by affidavit. In several instances first class railway fare has been shown although it now transpires that the respondent actually travelled second class. There is however no serious discrepancy as to the total amount shown under the head of railway fares. How this came about has been explained by the election agent. Apparently he got the respondent's account of his personal expenditure from respondent's cook, who only showed the total amount spent on railway fares without giving any further details. The election-agent had to guess from the total, the number and class of the tickets purchased on each occasion. He apparently assumed that the respondent had travelled first class, and so showed the first class fare in the return. The fact, however, was that the respondent did not travel first class, but he and one of his election agents travelled together second class, so that there was not one first class ticket but two second class ones, the total fare shown being correct. It is unnecessary to pursue the subject further. While we are of opinion that even error of the description should not have occurred in a document which requires to be accompanied by a sworn certificate of correctness, we are not prepared to hold that the account is false in a material particular.

We now turn to paragraph 17 of the election petition. The specific allegations in this paragraph are : (1) that the respondent accompanied by his election-agent and his sub-agent Khirod Babu toured in the neighbourhood of Bejura for canvassing purposes and that the expenditure incurred in that connection has not been shown in the return of election expenses, (2) that the printing charge of the respondent's election pamphlet entitled "the Minister of Education's appeal" has been omitted from the return. The other allegations in the paragraph have been given up at the time of argument.

As to the Bejura tour, we have already found that it was primarily an official tour, and the respondent did not have to pay the expenses from his own pocket. Those expenses have therefore been rightly omitted from the return. As to the expenditure incurred by his election-agent,

and Khirod Babu we find from the evidence that they went to Bejura on invitation from Rai Sahib Joy Nath Nandi. It is possible that while there, they did a little canvassing but we are not prepared to hold that they went there for the purpose of canvassing. The Rai Sahib tells us that he invited them to his house because the respondent was visiting the place and the Rai Sahib wanted him to have some society of the class to which he is accustomed during his stay in the village. We have it from petitioners' own witness Ramesh Chaudhuri that electioneering had not then commenced. This was at the beginning of July, the election being in November, 1923. Had the election-agent and Khirod Babu gone to Bejura for electioneering purposes, we cannot see any motive for their expenses being omitted from the election account, considering that the law has not prescribed any maximum of election expenditure. We do not therefore find any irregularity in the omission.

As to the printing charge of the pamphlet referred to, we find that the charge is still a disputed one. All the correspondence and discussion on the subject appears to have been carried on by the press, not with the election-agent, but with Khirod Babu. There is no evidence that the election-agent was aware of the claim even as a disputed one. Under rule 19(2) of the election rules the election-agent is required to state only such unpaid claims as he (or the candidate) is aware of. The omission of this disputed charge was not therefore an irregularity.

We now come to paragraphs 28 and 29 of the election petition. The only specific allegation in this paragraph which is pressed during argument is that relating to the arrangements at the Bejura polling centre. It is said that there were not adequate arrangements for secret voting and that many persons were allowed inside the polling station at the time of polling. One of the petitioners themselves, however, Jogendra Chandra Datta Chaudhuri, states in effect that all the necessary rules were observed. He proves that a desk was provided at which literate voters could record their votes, he also proves that he saw nobody going to the presiding officer except those who had legitimate business and so on. We do not think that there is any substance in this allegation. In connection with the irregularities and errors in the respondent's return of expenses, the learned pleader for the petitioners has invited our attention to the first part of rule 5, sub-clause 4, of the electoral rules and has asked us that even if we are unable to find it to be false in any material particular, we should find that it was not lodged in the manner prescribed by the rules, so as to enable the petitioners to move His Excellency the Governor under rule 25. We, however, see no defect in the time or manner of *lodging* the return. It was lodged within time, with the returning officer, and in the manner prescribed by the rules. It may be that it was not *prepared* strictly according to the rules, but we cannot say that it was not *lodged* in the prescribed manner.

The result is that we recommend that the petition be dismissed. We also recommend that the petitioners be ordered to pay Rs. 1,500 to the respondent as costs and pleaders' fees.

We desire to state that on some points we have not been able to be unanimous. The comparatively low figure we have recommended as costs is due to the fact that some of the charges have been dismissed on the ground of the benefit of the doubt and some others on the ground that although corrupt practices have been proved they did not materially affect the election.

CASE No. L
Hanthawaddy East, 1923
(BURMA LEGISLATIVE COUNCIL.)

MAUNG THWE	..	..	.. <i>Petitioner,</i>
			<i>versus</i>
MAUNG BA DUN	..	..	.. <i>Respondent.</i>

The rule regarding false statements and the ordinary law of defamation compared. It is doubtful whether "defamation, merely by innuendo" comes within the purview of the rule.

In this case the petitioner files a petition against the return of the respondent for the Hanthawaddy East General rural constituency who was declared to be duly elected, he having received 371 votes and the petitioner 81.

Two points only arise in connection with this petition—first, whether certain circulars (exhibits A, B and C) were admittedly circulated by the respondent, and second, whether they contain false statements of fact within the meaning of schedule IV, part I, rule 4.

We may say at once that there is great difference between this rule and the ordinary law of defamation, whether on the criminal or civil side. In order to come within this rule, there must be—

- (a) a statement of fact which is false ;
- (b) which the publisher either believes to be false or does not believe to be true ;
- (c) it must be in relation to the personal character or conduct of the candidate, or in relation to the candidature or withdrawal of the candidate ; and
- (d) it must reasonably be calculated to prejudice the candidate's election.

Before examining exhibits A, B and C we may mention that there were four candidates nominated for this constituency on or before the 21st of October, but that the nomination of two of them was found defective or invalid at the scrutiny on the 31st of October. One of these candidates—Maung San Tun Aung—was the candidate of that section of the G.C.B.A. which co-operated in the election, sometimes referred to as the 21 Party. On Maung San Tun Aung's nomination being invalid, this party adopted as their candidate the petitioner and certain literature of the party appealing to the electorate not to vote for persons outside their party as being Bahus, Gwas and Alodawwis was circulated. As the respondent did not belong to the Bahuthuta party, and is not a Government pensioner, he is accordingly attacked as a Gwa, which is a shifty sort of person who sits on the stile watching as to which side it is safer to come down upon. At the same time the non-co-operators—the other section of the G.C.B.A.—were circulating literature (exhibit G), in which it is laid down that the members must abstain from liquor and from gambling and from keenness of pleasure (*apyaw apa mya-gin*).

The respondent states that on seeing the G.C.B.A. leaflets he got exhibit A printed through one Maung Pe Gyi, and that Pe Gyi must have given the order for printing on the 25th of October ; and there is evidence that it was circulated, at any rate, on the 3rd of November. There is evidence that exhibit B was circulated on the 13th of November and exhibit C on the 18th.

Exhibit A was published without the printer's name, and the respondent on discovering it recalled it and published it as exhibit C with the printer's name. So that it is clear that at the time that exhibit A was ordered to be printed there were four candidates in the field.

In exhibit A the respondent asks the electors to choose a person replete with the six kinds of *Nayatkagon*. This, the respondent tells us, he got from a book called "Razadharma and Lokkaniti". He also advises that the person elected should conform to the following requirements, viz. that he should be 40 to 55 years of age and abstain from drinking alcoholic liquor, abstain from playing *ket*, cards, game of *ko-mè*, and other kinds of gambling; be replete with a sound moral education, wisdom and honour derived from connections with respectable relatives, and one who strives to perform meritorious deeds; should take an interest in the welfare of his countrymen and be a person of wealth, such as would be adversely affected if taxes on land and immovable property be increased. Then a special note is added—"A person who is 25 years of age and who can pay a tax of Rs. 5 a year, even if he be of humble position, a gambler and a drunkard, can stand as a candidate for the Legislative Council". Respondent states that he added this note to prevent any elector being misled into thinking that his previous points were qualifications required by law. None of the three rival candidates are mentioned in this circular.

As we have seen, the points of abstaining from liquor and from gambling had been based on rules which one section of the G.C.B.A. were imposing upon their members. Under these circumstances, a reference to them could not be taken as gratuitous.

After perusal of this circular we cannot find that there is any statement of fact relating to the personal character of the petitioner, which is false to the knowledge of the candidate publishing it, and, in our opinion, there is no remedy under this rule for statements which are only defamatory by means of subtle innuendo. We doubt whether defamation merely by innuendo can come under this rule at all. The party, of course, if aggrieved, has his ordinary remedy at law.

With regard to exhibit B. It sets out the merits of the respondent at considerable length and mentions that he does not take drink and is above dissipation, which is clearly perfectly legitimate for a candidate or his supporters on his behalf to state.

With regard to exhibit C. The petitioner's main point is that it was published when there was only one other candidate in the field, and, consequently, the special note at the bottom must have been aimed at him.

For the reasons which we have already given, when discussing exhibit A, we do not consider that there is any such necessary inference, and it is not a statement of fact within rule 4.

We accordingly report that the election of Maung Ba Dun to the Hanthawaddy East General constituency is valid.

The petitioner will pay the respondent's witnesses' costs and 20 (twenty) gold mohurs advocate's fees.

CASE No. LI

Hoshangabad District (N.-M.R.) 1931

(CENTRAL PROVINCES LEGISLATIVE COUNCIL.)

MR. KUNJA *Petitioner,*

versus

MR. GAJADHAR PRASAD JAISWAL *Respondent.*

Petitioner failed to make a cash deposit ordered in addition to the Rs. 1,000 already deposited. Petition dismissed.

THE main allegation on which the petition was grounded was that the notice of withdrawal, dated the 17th of October, 1930, presented on that day by one Gopal Prasad, *alias* Gopilal, was not subscribed by the petitioner and was not properly delivered to the returning officer as required by sub-rule (8) of rule 11 of the Central Provinces electoral rules. The respondent contended that the said notice was in fact subscribed by the petitioner and was delivered in accordance with the said sub-rule. The said notice was in fact delivered to, and accepted by, Mr. B. B. Royzada, senior Extra-Assistant Commissioner, Hoshangabad.

After the framing of the issues, the parties being called on to file their respective lists of witnesses, the petitioner filed a list of 54 and the respondent one of 87. At the first hearing of the case, the respondent had applied for an order requiring the petitioner to furnish security for the payment of any further costs under rule 36 (2) (b) of the electoral rules. This application which was put off for consideration at a subsequent stage was renewed when the lists of witnesses were actually filed. After hearing both sides we considered that from the nature of the case and the volume of evidence required to be given, it was evident that the respondent was likely to incur costs running into an amount far in excess of the sum of Rs. 1,000 already deposited by the petitioner. As the petitioner was admittedly a man of slender means and was not in such a position as to inspire confidence that the costs of the respondent would be easily recoverable from him in case his petition failed, he was ordered on the 2nd of March, 1931, to execute a bond for Rs. 3,000 with two sureties jointly and severally liable for the said amount, for the payment of the further costs that were likely to be so incurred. This amount was arrived at on a consideration of the number of witnesses to be summoned, the distances from which they were to be summoned, the costs of the counsel and the experts, and other incidental costs. The bond was ordered to be executed on or before the 19th of March, 1931. On the latter date, the petitioner produced two persons willing to stand sureties to the extent of Rs. 3,000 each, but the solvency of each of them was questioned by the respondent and, on the summary inquiries that were made, we were not satisfied that each of them was solvent to that extent. On this, the petitioner requested us to be permitted to deposit the amount of Rs. 3,000 in cash, and to allow him time to do so. The respondent objected to the grant of any further time, but in view of the fact that the petitioner had made some attempt to furnish security, we allowed him time as a matter of concession. This was, however, done on the distinct understanding that no personal security would be accepted thereafter. The petitioner was ordered to make the deposit by 12 noon on the 2nd of April, 1931, but failed to do so. On the latter date he put in an application asking for a review of our orders, dated the

2nd of March, 1931 and the 19th of March, 1931, and praying for acceptance security in the shape of a bond with two sureties. By our order, dated the 2nd of April, 1931, this application was wholly dismissed for the reasons given below.

As regards the review, this matter is governed by rule 1 of order no. 47, schedule 1, to the Civil Procedure Code, which allows a review only on the grounds specified therein. In the present case, the petitioner did not allege any of the grounds therein mentioned other than that our orders were illegal. Assuming that the alleged illegality of the orders is a sufficient ground for review, we are distinctly of opinion that there was no illegality in the said orders. The argument of the petitioner was that, since clause (b) of sub-rule 2 of rule 36 of the electoral rules confers the power of requiring the execution of a bond on the president of the commission, our orders, which were passed by the commission as a whole, were in contravention of the provision of that clause. In our opinion this argument is unsound. The said clause, it appears to us, contemplates a stage of the proceedings when either the entire commission has not been constituted or has not begun to sit. Sub-rule (5) of rule 36 clearly contemplates a case in which a president may be appointed before other commissioners are appointed. Besides, the said clause deals with the publication and service of a copy of the petition which are preliminaries to be undertaken before the hearing of the petition commenced before the full commission. The object of the clause, therefore, is to obviate the necessity of these preliminaries to be left over until the petition came off for hearing. It is, in our opinion, inconceivable that a power which is expressly conferred on the president alone was not intended to be conferred on the commission as a whole. Granting, however, that the intention was to restrict the power to the president alone, rule 37 of the rules clearly provides for the application of the procedure relating to the trial of suits under the Code of Civil Procedure to the present inquiry "as nearly as may be". This provision let in the power conferred by rule 1 of order 25, schedule 1, to the Civil Procedure Code in exercise of which we could make the orders that we did. The fact that the rule applies only to a plaintiff who resides out of British India or has no property therein can be left out of consideration, because under rule 37 of the electoral rules we had power to apply that rule "as nearly as may be". Moreover the said orders having been signed by the president could well be regarded as the orders of the president, and the signature of the Commissioners might be treated as superfluous.

Another argument advanced by the petitioner was that the order, dated the 19th of March, 1931, requiring security in the shape of a cash deposit was not justified by any rule or law. This argument is based on the fact that clause (b) of rule 36(2) of the electoral rules provides only for

the execution of a bond. In our opinion the object of this provision is to make a concession to the petitioner and not to prevent him from giving security in the shape of a cash deposit if he wanted to do so. Our order requiring him to make such a deposit was made at his own request, and cannot, therefore, be regarded as illegal. Besides this, as we have said before, rule 1 of order 25, schedule 1 to the Civil Procedure Code, gave us the power to require security either in cash or in the shape of a bond.

For these reasons we came to the conclusion that the review of our orders aforesaid ought not to be granted. Having come to this conclusion, we were bound to reject the petitioner's prayer made on the 2nd of April, 1931 to be allowed to furnish a bond with two sureties. This rejection could not take the petitioner by surprise as there was a distinct order on the 19th of March, 1931, that no personal security shall thereafter be accepted, and it was on that condition that time was allowed to him to make a cash deposit.

The deposit not having been made as ordered, the next question that arose was what was the consequence thereof. In regard to this, the petitioner asked us to refer the said question to His Excellency the Governor under rule 48 of the electoral rules. This rule expressly excludes the reference of a question arising in connection with an election inquiry. It does not, therefore, apply in the present case. We are also of opinion that the said question is not fraught with such a difficulty as to require a reference. We are clearly of opinion that we had power, in the situation in which we found ourselves, to proceed to close the inquiry and to submit our report. While it is true that the electoral rules do not expressly provide for dealing with such a contingency, it cannot be overlooked that, under rule 37, the procedure to be followed is the one applicable to the trial of suits "as nearly as may be". The Civil Procedure Code provides by rule 2 of order 25 for the dismissal of a suit when the required security is not furnished within the time fixed. Under this rule, we could at once proceed to recommend to His Excellency the Governor that the petition should be dismissed. Moreover, the case can be regarded as covered by rule 3 of order 17 which provides for proceeding to decide a suit forthwith on a party failing to perform any act which is necessary for the further progress of the suit and for the performance of which time has been granted to him. In accordance with this rule also, we could at once proceed to recommend to His Excellency the Governor that the petitioner having failed to substantiate the allegations on which his petition was grounded should be dismissed.

That these provisions of the Civil Procedure Code are applicable in a case like this has been held in the *Kolaba District* (see page 457). Though that was a case under the Bombay electoral rules, the fact that those rules also do not provide expressly for dealing with such a

contingency is clear from the report. There is, therefore, no ground to distinguish that case from the present one.

Accordingly we recommend that the petition should be dismissed both on the ground that the security required has not been furnished and on the ground that the allegations on which it was grounded have not been proved. As regards the costs of the inquiry, we recommend that all the costs as per schedule below should be paid by the petitioner who should also bear the charges for the publication of a copy of the notice and of the petition which have been deposited by him. We recommend that the fee payable to the Counsel on each side should be fixed at Rs. 200 and that the fee should be allowed only for one pleader on each side.

Before closing, however, we may humbly suggest for the consideration of His Excellency the Governor the desirability of clarifying the provisions of sub-rule (8) of rule 11 of the electoral rules with a view to obviate the possibility of a petition like the present. As the provisions stand at present, the returning officer or other person authorized is not bound to satisfy himself that the notice is really subscribed by the candidate who purports to do so, nor need the delivery required by that sub-rule be made in any particular manner. It appears to us that, if such a notice is expressly required to be presented by the candidate himself, or by his election agent appointed in accordance with sub-rule 5 of the same rule, that would be some guarantee that the notice was in fact subscribed by the candidate who purports to do so. In view of the importance of the said notice, some such amendment¹ seems to us to be desirable for the purpose of preventing such a fraud as has been complained of in the present petition.

¹ See, however, alteration effected by paragraph 3 (1) of Part II of the Indian Corrupt Practices Order, 1936.

CASE No. LII

Insein, 1923

(BURMA LEGISLATIVE COUNCIL.)

P. D. PATEL *Petitioner,*

versus

MAUNG BA GLAY
MAUNG KYAW DIN } *Respondents*

Where the hiring of a public vehicle is not brought home to the candidate or his agent, it must be proved that the election was materially affected by the use of the vehicle.

The ruling of a returning officer can be questioned on petition even though no objection was taken at the time of scrutiny.

Where the nomination paper of a candidate had been improperly accepted, it must be proved that the votes given to this candidate would in fact have been given to petitioner and would in number have given him a majority in order to set aside the election.

At the election the 1st respondent received 699 votes, the petitioner 588, and the 2nd respondent 349. The 1st respondent was accordingly declared duly elected.

On the petition we fixed the following issues :—

- (1) Was the nomination paper of Maung Kyaw Din invalid as alleged in paragraph 4 of the petition ?
- (2) If so, has the election been materially affected thereby ?
- (3) Has the 1st respondent been guilty of corrupt practices as alleged in paragraphs 5 and 6 of the petition ?¹
- (4) Did the presiding officer at Insein polling station fail to allow intending voters to vote or to tender votes ?
- (5) Did the number of tokens in the ballot-boxes exceed the number of voters who voted, as alleged in paragraph 10.
- (6) Is the election invalid by reason of all or any of these irregularities ?

As regards the 4th issue, we may mention that the petitioner, at the hearing, applied to amend paragraph 7 by making it read : “ The presiding officers at Insein and Hmawbi polling stations.” We disallowed the proposed amendment as it would be materially widening the scope of the charges against the 1st respondent and tend to prejudice him in meeting the petitioner’s case.

The petitioner only called one witness with regard to what happened at the Insein polling station, and it is perfectly clear from his evidence that there is no suggestion that the presiding officer in any way failed in his duty.

We accordingly answer the 4th issue in the negative.

With regard to the 5th issue. The returning officer, in his letter to the Reforms Secretary, dated the 24th of November does show that there were 1,636 tokens in the ballot-boxes and that, apparently, only 1,611 tokens were issued to voters. The only way in which he can account for the discrepancy is by incorrect counting of the return tokens by the presiding officers. The discrepancy is considerable. There is, however, no evidence raising even a suspicion of stuffing of the ballot-boxes. We may mention that the only station, which at the beginning of the case, was impugned by the petitioner—Dabein—shows a correct return of the tokens received and the persons voting. In the absence of some evidence raising the presumption of stuffing or misconduct in favour of some particular candidate, we cannot attach any importance to the discrepancy.

¹ Under the Government of Burma (Corrupt Practices and Election Petitions) Order, 1936, the hiring of a conveyance usually kept for letting on hire is a corrupt practice.

We accordingly, though we must answer the 5th issue in the affirmative, do not think that it in any way affects the validity of the election.

We then come to the 3rd issue—"Has the 1st respondent been guilty of corrupt practices as alleged in paragraphs 5 and 6 of the petition?"

We may say that the 2nd respondent does not appear as a party, though he has given evidence on behalf of the petitioner. We will accordingly allude to the 1st respondent throughout as the respondent.

The petitioner charges the respondent with hiring a taxi no. R. 6113 for the purposes of the election on the day of the election. The owner of the taxi, Syed Cassim, has been called who states that the durwan from the Sun Press asked him the charge for a trip to Taikkyi; that he stated it would be Rs. 50; that, as a matter of fact, he took respondent first to Dabein and then to Taikkyi and got Rs. 25 extra.

Maung Kyaw Din gives evidence as to the respondent giving him a lift in this taxi on two occasions on election day. Respondent is a member of the party of which the Sun Press is the principal organ.

On the evidence it is clearly established that the respondent did use a hired vehicle on election day. It is not alleged by the petitioner that respondent conveyed any voters to the poll in this taxi but merely went from station to station to see how the poll was proceeding. If the case stopped here, we would not have put a strict and technical construction upon the words "for the purposes of the election". To lay down that a candidate, who has not got a car of his own, is committing a corrupt practice, in endeavouring to visit the polling stations in a big and scattered constituency by the only means of transit at his disposal, would be, in our opinion, destroying the spirit through devotion to the letter, and the difficulty would be where to stop if we followed the letter. Would it be a corrupt practice for a candidate to ride on a vehicle where there is a regularly established system of motor busses? Would it be a corrupt practice for him to pay an anna fare for getting from one side of the river to the other in a ferry? Unfortunately for the respondent, the case does not stop here. His election agent, Ba Hlaing, has deposed that respondent has a car of his own, that he placed this car at his disposal whilst working for him at Insein. Under these circumstances we consider that the use of a taxi by respondent and thus letting his own private car for ordinary election purposes is a contravention of the rules.

The petitioner further charges that the respondent had, working for him, another taxi, no. 4021, which conveyed voters from Hlegu to Dabein.

On this point there is the evidence of Syed Cassim, 2nd witness, who states that he saw this car (4021), which was an Essex, at Hlegu, and he also states that there was no other taxi at Hlegu. There is also the evidence of Jan Ali, who was working for the petitioner, who states that it was a taxi and had the registered number 4021 on it. Maung Kyaw

Din also speaks to seeing an Essex taxi coming back from Dabein with five or six passengers in it. Jan Ali and Cassim state that this taxi carried voters to the polling station—Dabein—on three or four occasions.

No evidence has been given for the respondent to show that no taxi carried voters from Hlegu to Dabein, and under the circumstances we must hold that a taxi was employed to carry respondent's voters from Hlegu to Dabein.

It has not been proved that the respondent or his agent hired this vehicle. For the purposes of schedule IV, part II, rule 5, we hold that there has been a hiring of a vehicle usually kept for letting on hire or for the conveyance of passengers by hire, and that this vehicle was not paid for by the electors using it, and this is therefore a corrupt practice even though it has not been brought home to the candidate or his election agent.

What then is the effect of these two acts upon the election? In order to invalidate it, it must materially affect the result of the election. From the evidence of Jan Ali and Cassim, not more than from 13 to 17 voters were carried by the taxi from Hlegu to Dabein. The respondent only got 27 votes at Dabein. Supposing we deducted 15 votes from the 27 given at Dabein, this, by itself, would have no material effect upon the election, as the respondent's majority was 111.

With regard to the effect of the respondent allowing his private car to be free to work at the Insein polling station, we have very little to go upon as to the number of voters which is brought to the poll. Respondent got 62 votes at Insein. Even if we assume that it carried one-half of these (31), its plying even with the other car at Dabein would not materially affect the election.

While we answer the 3rd issue in the affirmative we are of opinion that our answer to the issue, by itself, would not materially affect the result of the election, but it may have to be considered in connection with the 1st and 2nd issues which we now come to.

The 1st issue turns upon, whether the nomination paper of Maung Kyaw Din was invalid.

Maung Kyaw Din stated that the election rolls were not at the disposal of the candidates at the time of nomination; that a well-known resident of Ywama quarter at Insein—one Maung Gyi, the pleader—had agreed to propose him; that he sent to the head clerk of the Deputy Commissioner, who was the returning officer, to ascertain what was Maung Gyi's number on the electoral roll: that the clerk told him that it was no. 6, Maung Gyi accordingly signed the nomination paper along with another man, who admittedly was a voter.

The scrutiny which was held on the 31st October was only attended by the respondent's agent and not by either the petitioner or Maung Kyaw Din or anyone on their behalf. Respondent's agent asked the

returning officer if the nominations were in order and he was told that they were. At the election day Maung Gyi turned up to vote but found that his name was not on the list, that no. 6 on the list was one Maung Kyi Maung. Maung Kyi Maung has been called and states that he voted as no. 6.

There is no question that Maung Gyi ought to have been on the voters' list. On the facts proved before us we are clearly of opinion that he was not on it. We are also clearly of opinion that the ruling of the returning officer under the Burma electoral rules, unlike that under the English law, is not final but can be questioned on petition, even though no objection was taken at the time of the scrutiny.

We are consequently of opinion that Maung Kyaw Din's nomination paper was invalid and we answer the 1st issue in the affirmative.

The 2nd issue raises the most difficult question in the case. For the petitioner it is alleged that the majority of votes given for Maung Kyaw Din would have been recorded for him. Kyaw Din, in his evidence, states that he at first promised his support to the petitioner and that his brother, Maung Aung Din, worked for the petitioner throughout, but that he changed his mind and was nominated as a candidate. He states that he has a certain amount of influence in the constituency through friendships with the family of his father who had been a Government officer for a number of years in the northern part of the constituency; that he also had certain influence through his religious community among Burmese Christians and Karens. The number of Karens, Shans and Burmese Christians on the electoral roll has not been given; we can accordingly only go upon the votes given at the various polling stations with which the petitioner has furnished us and the figures have been accepted by the respondent.

For the respondent one witness has been called, Maung Po Nge, a pleader of Tantabin. Through his friendship with one Sulaiman (an influential man of Hleseik), Maung Kyaw Din claimed that he got substantial support. Maung Nge, however, states that he was a supporter from the outset of the respondent but that out of friendship for Maung Kyaw Din he got some votes diverted from respondent to him at Tantabin and Hleseik. He made it clear that if Maung Kyaw Din had not stood, all these votes would have gone to the respondent and not to the petitioner.

On the evidence we are consequently of opinion that if Maung Kyaw Din had not stood, the majority of the votes given for him at Hleseik and Tantabin would have been given for the respondent. Consequently, even though we think that the majority of votes given for Maung Kyaw Din at Insein, Hmawbi, Taikkyi and Okkan would, in case he had not stood have been given to the petitioner, considering the petitioner's majority, this would not have affected the election, not even though we deducted 46 votes on the corrupt practice. And it

must be borne in mind that it is very problematical that votes given for Maung Kyaw Din, out of respect for his father or his family's influence, would have been given for petitioner—who, after all, is a stranger to many of them—merely on Maung Kyaw Din's advice.

We accordingly answer the 2nd issue in the negative.

We report that Maung Be Glay has been guilty of a corrupt practice, namely, in hiring a taxi motor-car while putting his private car at the disposal of his election agent who was working in the election, but as he did not convey voters to the poll in this vehicle, and as the election rules have been so recently enacted that a full knowledge of their consequences has not yet become general, we strongly recommend that the Local Government should, under rule 5 of electoral rules, sub-rule 4 (*proviso*), remove the disqualification.

We accordingly report that the election is valid.

On the question of costs. In consideration of the fact that there were irregularities and breaches of the provisions laid down in the rules and regulations, we are of opinion that the petitioner had some reasonable grounds for filing the petition and trying to have the election of the respondent set aside, and in this view of the matter we direct that each party bear his own costs.

CASE No. LIII

Jaunpur (N.-M.R.) 1921

(UNITED PROVINCES LEGISLATIVE COUNCIL.)

RAJA HARPAL SINGH *Petitioner,*

versus

PANDIT KRISHNA KANT MALAVIYA *Respondent.*

Personation proved. A polling agent should only identify those voters of whom he has personal knowledge.

False statements must relate, not to policy, but to the personal character or conduct of the petitioner.

Seat awarded to petitioner, but law on this point has been changed by the India Government Corrupt Practices and Election Petition Order, 1936.

THERE were seven charges of personation, two of which were pressed before the court. There was also a charge of publication of an untrue statement (exhibit A-1) by the petitioner.

As regards the offence of personation, it is admitted on behalf of the respondent that Munshi Partab Narain was the respondent's agent and identified Thakur Ram Sundar, although he did not know him personally. He did so only because of the statement made by Thakur Ram Sundar.

The petitioner has called the Superintendent of Police, Jagannath Prasad Mehta, who was the presiding officer at the polling station at Baksha. This gentleman states that he gave distinct instructions to the agents of the candidates to identify only such persons as they knew personally. Jamadar Singh, the petitioner's agent, at the same polling station corroborates this evidence. Both these witnesses make it clear that Munshi Partab Narain received distinct instructions before the polling began that any identifications of voters made by him were to be made only from personal knowledge.

Mohan Singh, cousin of Thakur Ram Sundar Singh, was called as a witness by the petitioner, and he says that he was present at the polling station with his cousin when Munshi Partab Narain came to his cousin and told him that Ram Sundar, Ahir, was not present and in this way a vote would be lost to the respondent and Ram Sundar Singh was invited to go and give his vote in the place of Ram Sundar, Ahir. The respondent called as his witness in regard to this issue Thakur Ram Sundar Singh, presumably in the expectation that he would give evidence in the respondent's favour. Unfortunately for the respondent, however, his evidence corroborates the evidence given by his cousin, Mohan Singh, above referred to. He says that he told M. Partab Narain that he was not a voter, to which M. Partab Narain replied that it did not matter as he paid rent over Rs. 50, and in consequence of this he went and voted.

In the written statement of the respondent it is suggested that M. Partab Narain acted in good faith and it was a genuine mistake on his part. We are unable to accept any such explanation. The duties of M. Partab Narain at the polling station are defined by regulation 17, clause 3, of the regulations published by the Local Government on July the 29th, 1920. The regulation quoted lays down: "Every signature or thumb-impression so made shall be attested by any candidate or his representative as aforesaid who may be able to recognize the voter." M. Partab Narain was the respondent's representative at the polling station and it was his duty to acquaint himself with the rules and with his duties. In the present case it is on record that the presiding officer himself gave him clear instructions. There can be no possible doubt that it was the duty of M. Partab Narain only to make identification in

cases where he had personal knowledge. He admittedly had no personal knowledge in the case of Thakur Ram Sundar Singh and there was no justification, therefore, for his identifying him. Apart from this, there is the fact which we find proved that M. Partab Narain deliberately introduced Thakur Ram Sundar Singh in the place of Ram Sundar, Ahir, in order to obtain his vote on behalf of the respondent, although Thakur Ram Sundar Singh stated that he had not been given the right to vote.

The important fact may also be noted that M. Partab Narain has not been produced as a witness.†

For the reasons given above, we decide this issue against the respondent.

The fourth issue is: "Did Shiam Bihari Misra, agent of the respondent, procure or abet the procuring of the application for a voting paper by Ajudhia, son of Kanhai, in the name of Ajudhia, son of Bodhai?"

On behalf of the respondent in this case also it is admitted that Shiam Bihari Misra was the agent of the respondent, and identified Ajudhia, son of Kanhai, although he did not know him personally. He did so solely because of the statement made by the said Ajudhia, son of Kanhai.

In this case the presiding officer at the polling station of Shujanpur was called by the petitioner. He stated that before the polling began he gave instructions to the agents of the candidates that they were to identify only such voters as they knew personally. It appears, however, that Shiam Bihari Misra arrived after the polling began, and the presiding officer cannot be sure whether he gave these instructions to Shiam Bihari Misra. It is possible, therefore, that Shiam Bihari Misra did not receive any express instructions from the presiding officer. It is admitted, however, that he was the representative of the respondent at the polling station, and therefore his duties as to identification are those defined under regulation 17, clause 3, of the regulations published by the Local Government on July the 29th, 1920. The regulation in question has already been quoted. It was the duty of Shiam Bihari Misra to acquaint himself with the duties which he had to perform and he was undoubtedly responsible for knowing the rules governing those duties. Jagannath Prasad was the signature slip clerk at the Shujanpur polling station. He is a witness called by the respondent. He has stated: "I read out to Ajudhia what was written in the electoral roll. Shiam Bihari was present. I cannot say who identified Ajudhia, but all identifications were made in my presence. I asked each man who identified whether he recognized the man he identified." The evidence of this witness shows that it was understood that identification was only to be made from personal knowledge and the witness says that he satisfied himself that this was understood in each case of identification. It is admitted

that Shiam Bihari Misra made the identification in the present case. It follows, therefore, that he told the signature slip clerk that he actually recognized Ajudhia, son of Kanhai, although as a matter of fact he did not know the man at all. In fact Shiam Bihari Misra admits that he had no conversation at all with Ajudhia. He says he had not got a copy of the electoral roll although he was present when the Kanungo was asking Ajudhia questions. If he had not the electoral roll with him it was impossible for him to check the answers given by the would-be voter.

We find in this case also that Shiam Behari Lal Misra, the agent of the respondent, had no justification of any sort for making a false identification. Issue 4, therefore, is also decided against the respondent.

Issue 10 is as follows :—

“Did the petitioner or his agent or any other person with the connivance of the petitioner or his agent publish in exhibits A-1, A-2 or A-3 any statement of a fact which was false, and which the petitioner or his agent either believed to be false or did not believe to be true in relation to the personal character or conduct of the respondent, and was any such statement reasonably calculated to prejudice the respondent's election ? ”

As to exhibit A-1, it is admitted on behalf of the petitioner that it was issued and published by the petitioner.

Two passages in exhibit A-1 are relied upon by the respondent. The first is as follows as translated : “Your sacrifice and unselfishness were tested on that very date when the Congress resolved for non-co-operation, and the unselfish congress-men like Pandit Moti Lal Nehru, Pandit Jawahir Lal Nehru, Babu Parshotam Das Tandon, Babu Sri Prakash and the revered Pandit Madan Mohan Malaviya withdrew.”

In our opinion the sentences quoted refer to the policy of non-co-operation and have nothing to do with the personal character or conduct of the respondent. The statement, therefore, is not covered by the fourth rule of schedule IV, part I.

The second portion of exhibit A-1 relied upon is as follows : “My desire was that you should have continued to stand till the 30th November, but your challenge is like the vanishing flicker of a lamp and indicates your sudden disappearance from the contest.” It is argued on behalf of the respondent that this sentence suggests that the respondent had withdrawn from the election, and therefore it was a statement which would fall within the definition given in rule 4 of schedule IV, part I.

We do not agree with this interpretation of the respondent. The very next sentence in exhibit A-1 is as follows : “I therefore accept your challenge or your last cry if you appoint an umpire as is the custom

in all discussions.” It appears that exhibit A-1 is a reply to a challenge made by the respondent to the petitioner that they should both meet before a common assembly and ask each other questions and the assembly would be in a position to hear their replies and in this way settle which candidate the assembly preferred. The sentence in exhibit A-1 just quoted shows that the petitioner was prepared to accept this challenge, thereby showing unmistakably that he did not consider that the respondent had withdrawn from election and anyone reading exhibit A-1 would also realize that the respondent was still one of the candidates for the constituency.

For the reasons given above, we find that there is nothing in exhibit A-1 which can be brought under rule 4 of schedule IV, part I.

As to exhibit A-2, it purports to be an open letter signed by one Chhotu Lal. In this connection for the petitioner it is stated that Chhotu Lal was not a worker for the petitioner and the petitioner knows nothing about him or exhibit A-2.

The first passage in exhibit A-2 relied upon by the respondent is translated as follows :—

“Do you not remember that when there was a quarrel between Hindus and Musalmans at Chorari Malaviyaji Pandit Madan Mohan did not help you at all and gave you a blank reply ? ”

Pandit Madan Mohan Malaviya is the uncle of the respondent. The sentence quoted refers to Pandit Madan Mohan Malaviya, and we are unable to see how a statement regarding the respondent's uncle can be treated as a statement regarding the personal character or conduct of the respondent himself.

The next portion of the paper, exhibit A-2, relied upon is as follows in the translation :—

“Poor Hindus, brethren who had received shots came away disappointed. In the Council of the Lat Sahib (Provincial Council) Syed Ali Raza Sahib was interpellating on behalf of the Musalmans and was prepared to fight for the Musalmans, but not a word came out from the mouth of Pandit Madan Mohan Malaviyaji on behalf of the Hindus. *The Jadu* newspaper of Jaunpur wrote many complaints against Babu Mani Bhushan Chakravarty, Deputy Collector, and on the strength of the writings of that paper, Syed Ali Raza Sahib complained against the said Deputy Collector in the ‘Lat Sahib Council’. But the *Abhyudaya* newspaper, whose editor Pandit Krishna Kant Malaviya poses to be, did not speak for or against the questions of the Syed Sahib at that time. Is it then on the strength of this love of country that Malaviya has come to Jaunpur to take votes? Was Malaviya a vakil, could he not come to Jaunpur and look after the cases of the Hindus in the *Chorari* case? Was Malaviya a member of the Council? Could he not give

replies to the questions of the Musalmans ? Could *Abhyudaya* not help the Hindus ? Then what is the reason that Malaviyaji was silent at that time and to-day he is asking for votes from the Hindus of Jaunpur ? ”

In this portion also of exhibit A-2 reflections are made against the respondent's uncle and also against the *Abhyudaya* newspaper which is practically owned by the uncle. The respondent is at present the editor of the *Abhyudaya* newspaper. He was not the editor at the time of the Chorari riots. Statements regarding the *Abhyudaya* newspapers more specially at the time when the respondent was not the editor and statements regarding the respondent's uncle in our opinion cannot be regarded as statements in relation to the personal character or conduct of the respondent.

The next portion of exhibit A-2 relied upon by the respondent is as follows as translated :—

“ If you consider Malaviya to be a very big leader, then it is your mistake. Only he who has a zemindari and who is managing a raj can know about politics, and one who does not own a ‘ dhur ’ of land, what knowledge can he have about the management of an estate ? ”

The respondent owns a zemindari which pays Rs. 13 or Rs. 20 annual revenue and he manages it through his servant. It is perhaps an exaggeration to say that he does not own a “ dhur ” of land. It is quite true, however, that he is not a practical zemindar and the criticism made in regard to him therefore has justification. We do not find that there is any reflection upon the personal character or conduct of the respondent in the sentences just quoted above.

The last portion of exhibit A-2 relied upon by the respondent is translated as follows :—

“ The present day modern leaders cannot do anything except spreading sedition (disloyalty). If you want to obtain *Swarajya*, then elect and send members like Thakur Harpal Singh to the Council. There is loss in disloyalty and benefit in loyalty. Those things which you can obtain by pleasing the King cannot be obtained by non-co-operation. Vicious horses are whipped, their rations are stopped and they are shot. The owner keeps good horses with love and gives them every sort of comfort. See how soon has the Kashi Naresh (Maharajah, Benares) obtained *Swarajya* by pleasing the Government. Therefore while electing your representative to the Council you should also bear in mind whether your representative has the signs and virtue of loyalty. Thakur Harpal Singh Sahib has both the qualities of loyalty and love of country and therefore you should elect Thakur Sahib. You should remove this idea from your minds that Malaviya will win *Swarajya* for you by arguing. *Swarajya* will be obtained by humility and loyalty. Krishnaji Maharaja bestowed all the gifts on Sudama Brahman by his prayers, but Kans was killed on account of his pride. *Swarajya* was

obtained by Bhabhishan. Rawan, though a leader like Malaviya, met with destruction.”

In our opinion the real meaning of the paragraph is that in the opinion of the writer *Swarajya* can be obtained by loyalty and not by disloyalty to the King. Kans was the opponent of Krishna. Sudama was the helper of Krishna. Bhabhishan was the helper of Rama while Rawan was the opponent. In both cases Kans and Rawan were killed while Sudama and Bhabhishan were rewarded. The whole reference is to the policy of non-co-operation, which is described as disloyal and therefore unlikely to result in any benefit to the nation. There is nothing in the paragraph which can refer to the respondent except the words “Rawan, though a leader like Malaviya, met with destruction”. The words, however, do not say more than that Malaviya is a leader. They do not say that he is like Rawan in any other respect. The paragraph does not say that the respondent is in favour of non-co-operation or is disloyal.

For the reasons given above we find that there is nothing in exhibit A-3 which can be brought under rule 4 of schedule IV, part I.

The translation of exhibit A-3 is as follows :—

“ I give notice of the wrong tactics of Pandit Krishna Kant Malaviya to the gentlemen of the district and the Baksha polling station. Malaviya has against my opinion and without asking me given notice of the fact that I am the convener of his meeting. This has been done to deceive the public. Therefore I warn you all not to be deceived in this way. In my opinion Thakur Harpal Singh is fit to go to Council.”

PANDIT SUBHKARAN UPADHYA.

It is asserted on behalf of the respondent that a meeting was called for on November the 1st at Baksha by one Subhkaran Upadhyaya and three or four others to support the candidature of the respondent. On the day of the meeting exhibit A-3 was circulated amongst the members of the meeting by Jamadar Singh, Partab Singh and Raghunath Tiwari, workers on behalf of the petitioner, with the intention of inducing the public to believe that the respondent had received them and that the meeting was not convened by Pandit Subhkaran Upadhyaya at all.

It is to be noted that in the written statement of the respondent there is absolutely no mention at all of this incident as now related. It was not until pleadings were gone into in court that this incident was mentioned for the first time. On behalf of the respondent it was stated on February the 26th : “ The third exhibit A-3 purports to be signed by Subhkaran Upadhyaya but is not actually signed by him. He was a man on the side of the respondent. This third notice was lithographed in the house of the petitioner and was issued with his connivance.”

On behalf of the petitioner it was stated on the same date that exhibit A-3 was not lithographed in the petitioner's house and the petitioner knew nothing about it.

In this connection the respondent has called two witnesses, Subhkaran Upadhyia and Sheo Prasad Misra.

We find that the respondent has not succeeded in proving the publication of this notice, exhibit A-3. Subhkaran Upadhyia states that it was he and three or four others who convened the meeting for November the 1st. They did so by means of a notice which was signed. The original of this notice has not been produced before this court. A printed copy purporting to be a copy of the original has been produced, but there is no satisfactory explanation as to why the original itself is not forthcoming.

Subhkaran Upadhyia's evidence is unsatisfactory. He began by stating that the day fixed for the meeting was November the 2nd and it was not until the very end of his statement, when exhibit A-6 was produced which was the printed notice convening the meeting, that he then stated that the day for the meeting was November the 1st and not November the 2nd.

He states that on the day fixed for the meeting which was to begin at 3 P.M. he went away to Jaunpur, which is some eight miles from Baksha, in order to consult his vakil about the filing of an appeal. He returned about 4 P.M., when he was informed by his son that the notice, exhibit A-3, was being distributed at the meeting which had already begun.

The meeting was an important meeting at which it appears that the respondent himself was to make a speech. The meeting had been convened by Subhkaran Upadhyia. It is difficult to understand why he was absent from the meeting at its commencement when he had made himself responsible for that meeting. He admits that there were 5 or 6 days still left before the period for filing the appeal would elapse when he went to Jaunpur. He admits also that he found the vakil busy in the courts and was unable to consult him about his case. He must have found time on a later day to consult the vakil because the appeal has actually been filed. There was no reason, therefore, why Subhkaran Upadhyia should have gone to Jaunpur on the day fixed for the meeting, and we find that his evidence that he did go to Jaunpur on that date is not to be relied upon. He would only have gone to Jaunpur at the urgent request of his vakil, and in that case he would not have come away from Jaunpur without the vakil having talked over the matter of the appeal over with him.

The only other evidence in support of Subhkaran Upadhyia is the evidence of Sheo Prasad who is a cultivator and also a small zemindar. It appears, however, from the evidence of Sheo Prasad that the respondent

himself was present at the meeting and lectured. This is a very significant fact in our opinion. If the respondent himself was actually present at this meeting, he must have known of the existence of exhibit A-3, and therefore there is no explanation as to why in the written statement there is no mention of the incident of exhibit A-3 at all. The respondent himself gave no evidence in the witness box as to this incident. It is also significant that when this incident was first mentioned on February the 26th all that was said on behalf of the respondent was that this notice, exhibit A-3, was lithographed in the house of the petitioner and was issued with his connivance. There is no evidence forthcoming to prove that exhibit A-3 was lithographed in the house of the petitioner, and there was no mention on February the 26th of the name of Jamadar Singh, Partab Singh and Raghunath Tiwari who, according to the two witnesses for the respondent, distributed the notice, exhibit A-3, at the meeting.

The whole incident is extremely improbable in itself. If the meeting had actually been convened for the purpose of the respondent addressing the electors, it would have been a very bold course for the petitioner to take to distribute notices at that very meeting saying that it was not actually convened by Subhkaran Upadhyaya and Subhkaran Upadhyaya was not in favour of the respondent. Had such a distribution of notices actually taken place, it is difficult to understand why so little notice apparently was taken of the incident. According to Subhkaran and Sheo Prasad, all that was done was that Subhkaran Upadhyaya got up and stated that he had not issued the notice, exhibit A-3. Nothing is said as to what happened to the men who had entered the enemy's camp. The meeting would have surely insisted on those men to give some explanation for their conduct.

It is also difficult to understand why the petitioner should have confined himself to a notice in the name of Subhkaran Upadhyaya alone when the meeting is said to have been convened by that gentleman and three or four other gentlemen also.

For the reasons given above, we are not satisfied that the respondent has proved the publication of exhibit A-3 or that it had anything to do with the petitioner.

For the above reasons, we decide issue 10 against the respondent.

We have decided issues 1 and 4 against the respondent. He is, therefore, found responsible for the commission of two corrupt practices as defined by rule 3 of schedule IV, part I, and we report therefore that under rule 42 the election of the respondent is void.

We have found that the recriminations against the petitioner have not been proved by the respondent. It is admitted that the petitioner and the respondent were the only duly nominated candidates. The

respondent's election is found by us to be void. We therefore report that the petitioner is entitled to be declared to be duly elected.¹

We order that the petitioner should receive his costs from the respondent and we fix the amount of such costs at Rs. 300.

Under rule 45 we find that M. Partab Narain and Pandit Shiam Bihari Misra, both agents of the respondent, have been proved guilty of corrupt practices as defined by rule 3 of schedule IV, part I. We do not recommend that either M. Partab Narain or Pandit Shiam Bihari Misra should be exempted from any disqualifications they may have incurred in regard to the fact that those corrupt practices have been proved against them.

¹ The Government of India Corrupt Practices and Election Petitions Order, 1936, part III, paragraph 3(2) has altered the law on this subject.

CASE No. LIV
Jessore North (M.R.) 1924 .
(BENGAL LEGISLATIVE COUNCIL.)

KHAN BAHADUR ABDUS SALAM *Petitioner,*

versus

MAULVI RAFIUDDIN AHMED *Respondent.*

Case heard *ex parte*.

Ballot-papers marked with the official seal intended for voters for the Legislative Assembly election were allowed to be counted at an election for the Legislative Council unless otherwise invalid. The mistake was made by the polling officer, but there was a mark which shewed that these particular ballot-papers had been issued by the polling officer.

In the result this gave a clear majority of votes to the petitioner, and he was declared to be elected.

THIS is an election petition of Khan Bahadur Abdus Salam against the election of Maulvi Rafiuddin Ahmed to the Bengal Legislative Council from the North Jessore Muhammadan constituency. The petitioner and the respondent were the only two candidates from the constituency. The respondent was elected by a majority of 38. The allegation of the petitioner was that on 76 ballot-papers the votes were recorded in his favour, but they were improperly rejected by the returning officer on the ground that they were not marked with the secret official seal indicative of the Bengal Legislative Council. It was asserted, and it has not been denied, that by some mistake or other these ballot-papers had been stamped with the official secret seal indicative of the Legislative Assembly instead of the official secret seal indicative of the Bengal Legislative Council.

The petition of election was published in the *Calcutta Gazette* of the 6th February was fixed for hearing on the 21st February, 1924. On that date there was no appearance on behalf of the respondent. We thereupon heard the learned Counsel appearing for the petitioner, and inspected the ballot-papers and other papers relating to the election which we obtained from the secretary, Bengal Legislative Council. We were desirous of knowing how the mistake had occurred and we postponed our consideration of the case until we saw the correspondence on the subject which was said to have passed between the returning officer and Government. The case was adjourned to the 27th February. On the previous day the respondent had appeared and had asked for time to file a written statement, alleging that he had a virulent attack of asthma. This petition was pressed before us on the 27th February. It transpired during the discussion of the case that the respondent had actually resigned his seat. The respondent was thereupon asked to give his deposition. It appeared from his deposition that he was aware of the petition and the date of hearing, and that he left the case to be decided by the Commissioners under the idea that they would examine the materials and give their decision. It also appeared that the respondent, though ill, was not so seriously ill as to be unable to appear before us or inform us what his answer was as to the allegations of the petitioner. The respondent had obviously changed his mind. We held in these circumstances that no case of extending the time had been made out and we rejected his prayer for an adjournment.

The respondent filed a written statement. It does not make out a case for an enquiry. Briefly the written statement amounts to this that the respondent suspects some foul play at the polling station of Mahamadpur where these votes were recorded. In the first place mere suspicion is not enough. In the second place the idea of a plot must be discarded since it resulted in the respondent's favour. This is admitted

in paragraph 12 of the written statement. We are therefore not called upon to embark on an investigation as desired by the respondent.

The election petition then must be decided on the issue whether the ballot-papers stamped with the official seal indicative of the Legislative Assembly were rightly rejected or not. The learned vakil for the respondent contends that they were rightly rejected because the proper seal was not used. There is prayer in the alternative that a fresh election might be ordered. The election did take place, and the only question before us is which of the two candidates had a majority of votes. We cannot therefore direct a fresh election.

For the petitioner, Halsbury's Laws of England, vol. XII, page 317, was quoted. The case of *Cirencester* 4, O'M. & H., 195, is the case in point. It was held that where the evidence is that the presiding officer has intended to make and has in fact made what fairly looked at indicates that a recognizable official mark is upon the back of the ballot-papers, the ballot-paper is not to be rejected for want of the official mark. As observed by the learned vakil for the respondent, this does not help us. Then the question was whether any official mark was used at all. Here we have a case where a wrong official mark was used. There is no guide for us in the English cases for apparently no such case ever occurred in England. We propose to follow the rule of equity and good conscience. The law that a ballot-paper must be rejected which has not on its back the official mark was designed to set at rest the question whether the particular ballot-paper was issued by the polling officer. Here there is no doubt that these ballot-papers were stamped by the polling officer with a wrong official seal and issued to the voters. We hold that the votes recorded in these ballot-papers in the petitioner's favour should be counted for the petitioner unless otherwise invalid. We have carefully examined the rejected ballot-papers and we find that there was a clear majority of votes in favour of the petitioner. We hold therefore that the election of Maulvi Rafiuddin Ahmed should be declared void and should be set aside under section 44, clause (c). We hold that the petitioner should be declared to be duly elected to the Bengal Legislative Council.

In the peculiar circumstances of the case we recommend that the parties should bear their own costs.

CASE No. LV

Kangra *cum* Gurdaspur (M.R.) 1924

(PUNJAB LEGISLATIVE COUNCIL.)

MUHAMMAD FAZAL KHAN *Petitioner,*

versus

CHAUDHRI ALI AKBAR *Respondent.*

Personation and treating proved.

An election petition cannot be amended, but the Commissioners have the power to call for further and better particulars. If however, no particulars are delivered at all, then the discretion ought not to be exercised.

THE election of Chaudhri Ali Akbar, respondent, to the Punjab Legislative Council, as a representative of the Kangra *cum* Gurdaspur Muhammadan rural constituency has been called in question by the petitioner, Muhammad Fazal Khan, one of the rival candidates, on the ground of certain "corrupt practices" alleged to have been committed by Chaudhri Ali Akbar or his agents. The petitioner also alleged that the return of expenses filed by Chaudhri Ali Akbar was incorrect and false in material particulars. The respondent denied these allegations; and filed in his turn a recriminatory petition charging the petitioner with corrupt practice and also challenging the correctness of his return of expenses. This the Commissioners found to be unsustainable.

Several of the charges brought by the petitioner had to be struck off for want of particulars—(*vide* preliminary order, dated 29th March, 1924—a copy of which forms an annexure to this report), with the result that the trial of the petition was confined to two charges only, viz. : (i) personation, and (ii) treating. These charges may be briefly stated as follows :—

- (i) That the respondent, Chaudhri Ali Akbar, procured personation of a voter named Abdul Ghani (electoral no. 91) by one Umardin, of village Bharat, at the Dina Nagar polling station on the polling day (22nd November, 1923).
- (ii) That the respondent's agents (viz. Muhammad Munir, his son Sardar Muhammad, brother-in-law of Muhammad Munir, Ali Ahmad, uncle of Sardar Muhammad, and Ghulam Farid), with his knowledge and consent, feasted a large number of voters in a garden near the Batala polling station on the polling day (26th November, 1923) with the object of influencing their votes.

With respect to the first charge, the petitioner produced the voter, Abdul Ghani, the personator, Umardin, and others as his witnesses. Abdul Ghani deposed, that he did not vote at the election. Umardin's evidence was that the respondent told him along with others of his village that he had a vote, and that he should go and vote for him. Umardin accordingly went to Dina Nagar on the polling day. Respondent was present there and procured a "*parchi*" for him from Rur Chand Patwari. Umardin then went into the polling enclosure, as directed by the respondent, and voted for him. Nathu (P.W. 5), who belongs to the same village as Umardin and who also voted for the respondent (a fact which we have verified from his ballot-paper) supports Umardin's statement. Fazal Muhammad (P.W. 6), a Lambardar of the same village, deposes to having seen Umardin with the respondent at Dina Nagar on the polling day. Khan Sahib Alam Khan (P.W. 7), election agent

of the petitioner, states that he too was present at Dina Nagar and overheard Umardin telling his friends later on that the respondent had made him record his vote in place of Abdul Ghani. Hidayat Ali, Lambardar (P.W. 15), and Ahmad Ali, Safedposh (P.W. 18), depose that the respondent was present at Dina Nagar polling station and was directing or taking his voters to the polling enclosure. Finally, a finger-print expert from Phillaur (P.W. 9) has compared the thumb-impressions of Abdul Ghani and Umardin, with the thumb-impression on the counterfoil of the ballot-paper of the person who cast his vote as voter no. 91, and has definitely given his opinion that the thumb-impression of Umardin does correspond with that on the counterfoil, and that the thumb-impression of Abdul Ghani does not correspond with it. The corresponding ballot-paper corroborates Umardin's statement that he voted for the respondent.

As against the above evidence, the respondent has only produced Rur Chand Patwari, who deposes that he gave no "*parchi*" to Umardin, and that as a matter of fact, he could not have done so, as he was employed in connection with the Legislative Assembly election and not the Council election. The respondent has also gone into the witness box and denied that he asked Umardin to personate any voter or took him to the polling enclosure.

We do not think much stress can be laid on Rur Chand's evidence in the face of the evidence of the finger-print expert, which leaves no doubt that Umardin did vote at Dina Nagar, as stated by him. Umardin was asked the name of the Patwari only in cross-examination, and has apparently made a mistake in naming Rur Chand. But there can be no room for doubt that he must have obtained a "*parchi*" from some Patwari in the ordinary course at the polling station, before casting his vote. The respondent has totally failed to give any satisfactory explanation of the evidence produced by the petitioner.

It was argued that the respondent had a majority of 200 votes, and that he could not have stooped to procure false personation, and that too for the sake of one vote. But the respondent may not have been sure of his success, and though only one case of personation has been brought to light, there is no guarantee that it was really the only one for which the respondent was responsible. We might have felt hesitation in accepting the petitioner's evidence on this charge if the respondent had made out any *prima facie* good grounds for looking upon it with suspicion. But, as already remarked, he has altogether failed to offer any reasonable explanation of the evidence produced against him. Under the circumstances, we see no justification for disbelieving the latter evidence, and must hold the charge to be proved. The "personation" having been procured by the respondent himself, the "corrupt practice" falls under part 1 of schedule V of the electoral rules.

As regards the charge of "treating", the Commissioners found that "about 100 to 150 voters of the respondent were fed on the polling day while the polling was in progress by a person related to the respondent, and with the connivance of his son, whom we have held to be his 'agent' for the purposes of the election. The respondent's attempt to prove that it was a general feast given by Ali Ahmad to voters and non-voters alike and out of pure hospitality has failed and the inference seems irresistible that it was given with the object of influencing the election, either with the object of inducing the persons fed to vote for the respondent or as a reward for their having voted for him. We accordingly find that Munir, an 'agent' of the respondent was guilty of the corrupt practice of 'bribery' in the form of 'treating'."

There is no evidence on the record to show whether the treating was done with the consent or connivance of the respondent. He was admittedly not at Batala on the polling day, and in the absence of such evidence he cannot be personally held guilty of this offence. However, even "treating" by a third person with the connivance of an agent of a candidate would fall within the definition of "bribery" and would be sufficient to avoid his election—(*vide* rule 44(b) and definition of bribery in part I of the schedule V of the electoral rules). It is urged on behalf of the respondent that the offence would, at the most, fall under the second part of rule 44. But there is no evidence before us to show that the respondent had taken "all reasonable means for preventing the commission of the corrupt practice" and that it was committed, contrary to his orders. As many as 100 or 150 voters were treated and, under the circumstances, we do not think we would be justified in holding that the corrupt practice was of "a trivial, unimportant or limited character". We accordingly hold that the corrupt practice of "treating", which has been proved in this case, falls under rule 44(b) and renders the election of the returned candidate void.

The petitioner has prayed in his petition that he should be declared "duly elected" inasmuch as he secured the next highest number of votes; but we do not think he is entitled to any such declaration. Although the effect of the charges of "corrupt practices" proved against respondent Ali Akbar is to render his election void, it cannot be said with any certainty whether the petitioner or the third candidate would have been elected if Ali Akbar had been out of the contest. The votes given to Ali Akbar cannot be considered to have been merely thrown away (*cf.* Rogers on Elections, volume II, edition of 1918, page 130; also see *Sheikhupura* case, page 653). As a result, a fresh election will be necessary.

ANNEXURE TO REPORT.

A preliminary point was raised in this case by the respondent to the effect that both the petition and the list of particulars attached thereto

are vague and indefinite and, therefore, violate the provisions of rule 33(1) and (2) ; and he, therefore, asks us to dismiss the petition. The petitioner whilst admitting that the particulars were not such as were required by rule 33 (1) and (2) says that we have power under rule 33(3) to allow him an opportunity to furnish further and better particulars. The respondent objected to any such opportunity being given to the petitioner. We framed a preliminary issue and have heard Counsel on both sides at length. It was contended by the petitioner's Counsel that if we now decided that no particulars whatsoever have been given in the petition or the list, it would be tantamount to our going behind the order of His Excellency the Governor, who alone was competent to dismiss the petition under rule 36(1), if he found that the provisions of rule 33 were not complied with and he urged that we have no such power. Very lengthy arguments were addressed to us on this point, but we agree with the Government Advocate's view that this question does not arise in this case. What we have to see is whether we can allow the petitioner to amend his petition and list of particulars at this stage or not. We consider that rule 33(3) gives us power to call for further and better particulars if we so desire. This power, however, refers only to the particulars, and not to the petition. The present rule 33 (1) and (2) and (3) is different to the old rule 31, and the present rule is clearer and more stringent, and requires that the petition shall contain the material facts and that the petition shall be accompanied by a list " setting forth full particulars of any corrupt practice which the petitioner alleges, including as full a statement as possible as to the names of the parties alleged to have committed any corrupt practice and the date and place of the commission of each such practice ". This rule, therefore, gives a very clear indication as to what a petitioner is required to do. And this is as it should be, for no person should be allowed to deliver particulars which contain nothing but the name of the candidate and the character of the offence suggested and leave everything else blank and open to an attempt under them to fish out some possible material from which the blank may be filled up. To allow this would be allowing an abuse of procedure. A similar question was raised in the *Saharanpur* case (see page 623), and it was decided therein that the Commissioners had no power to allow the amendment of the petition as there was no rule to that effect, and that rule 35 (now rule 37), which directed the Commissioners, to inquire into the petition " as nearly as may be, in accordance with procedure applicable, under the Code of Civil Procedure, 1908, to the trial of suits " referred only to the conduct of the enquiry and not to the petition. This was under the old rule 31 but, as already stated, rule 33(3) now gives the Commissioners power to allow amendment. As this power or discretion, however, refers only to the particulars, we are in agreement with the argument of the respondent's Counsel that if

no particulars are delivered at all, then the discretion ought not to be exercised. We have carefully considered the list of particulars in the light of the above remarks, and we have no hesitation in saying that no particulars, as required by rule 33(2), have been given with regard to charges contained in paragraphs 2 to 4 and 6 and 7 of the list of particulars, and we, therefore, refuse to allow him to amend these. Paragraphs 1 and 5 of the list stand on a slightly better footing, as there are some definite particulars, though not as full as are required by rule 33(3). We would allow one opportunity to the petitioner to deliver further and better particulars with regard to the charges contained in paragraphs 1 and 5 on payment of Rs. 150 as costs to the respondent. The result is that amendment of paragraphs 2 to 4 and 6 and 7 having been refused, the charges contained therein fail and the petitioner is confined to proving the charges contained in paragraphs 1 and 5 only.

CASE No. LVI

Kheri and Sitapur (M.R.) 1924

(UNITED PROVINCES LEGISLATIVE COUNCIL.)

THAKUR NAWAB ALI KHAN *Petitioner,*

versus

QAZI HABIB ASHRAF *Respondent.*

To establish undue influence by the exercise of spiritual censure, it must be proved that there was a definite threat. An appeal to religious prejudice does not amount to "undue influence".

THE important issue was as follows :—

(a) Was exhibit I published and circulated by the respondent no. 1 or by his agent or agents or by any other person with the connivance of respondent no. 1 or his agent or agents ?

(b) Do the statements in exhibit 1 constitute undue influence within the meaning of clause 2, part II, schedule 5 ?

P.W. 12, Maula Baksh, stated that 2,000 copies of the notice, exhibit 1, were printed by him on the order of one Sakhawat Ali, who represented that the order was on behalf of respondent no. 1. Respondent no. 1 in his examination under order IX, rule 1, said he did not authorize the printing of exhibit 1 and had not seen it before it was printed, but he paid the bill for printing. This appears to be a ratification of the act of an agent. In Halsbury's Laws of England, volume 12, page 273, it is stated : " If the candidate knowingly ratifies the act under consideration, he is liable as though the act had been that of his agent at the time when it was done." There is the evidence of five witnesses P.Ws. 22, 23, 25, 27 and 28 as to distribution of the pamphlet, exhibit 1, on behalf of respondent no. 1. In Hammond's " Indian Candidate and Returning Officer ", page 57, it is stated that a candidate is responsible for such acts on his behalf.

We find on this issue that exhibit 1 was printed with the ratification of respondent no. 1, and circulated by persons with the connivance of his agents, and therefore presumably with the connivance of respondent no. 1.

The exhibit 1 opens with four lines of Urdu poetry :—

" Yeh tiksali election ka jo sikka aj jari hai
Khara khota parakh lo kon ismen char-yari hai
Habib Ashraf hai nam uska chuna hai qaum ne jisko
Bas ab dekho Khilafat ka woh hi inmen se hami hai."

These lines appear to mean that at this time of election choice should be made between the genuine and the spurious candidates. A double meaning is contained in the word " char-yari " which means—

- (1) A Baluchi coin of pure metal.
- (2) A Sunni or believer in the four Khalifas.

The electors are enjoined to select Habib Ashraf because he supported the Khilafat.

The three candidates are then mentioned, and it is pointed out that two are Shiahs (petitioner being also reputed by some to be a Christian), whereas respondent no. 1 is a Shiah. The rest of the pamphlet has not been assailed as objectionable.

It was argued for petitioner that this exhibit 1 comes within the definition of undue influence in schedule V, part I, rule 2, and particularly

explanation (1) (b), which states " induces or attempts to induce a candidate or voter to believe that he or any person in whom he is interested will become or will be rendered an *object of divine displeasure or spiritual censure* ". These words are taken from the English Act of 1883 (Hammond's " Indian Electioneering ", page 102) and cases from *County Meath*, Ireland, in 1892, quoted on pages 103 and 104 of Hammond show what is meant : " Parnellism is nothing better than heresy in its teaching ; it is immoral and condemned by the Irish Bishops of the Catholic Church and I would approach the death-bed of a profligate and drunkard with greater confidence than that of a dying Parnellite. Any woman that sympathizes with Parnellism is worse than an abandoned woman." These words in the pastoral address of a Bishop were held to amount to a *threat* of the nature prohibited by law.

In the exhibit 1 there is no threat or suggestion that the voters would render themselves " objects of divine displeasure or spiritual censure " if they did not vote for respondent no. 1. No doubt an appeal is made to their religious prejudices, but this does not amount to undue influence. In the "*Darbhangha* case" there was a *distinct threat* : " If you give your votes to him it will be for your benefit ; if not, you will commit a sin and incur Mr. Gandhi's displeasure and curse ", and it was held " since Mr. Gandhi is admittedly regarded by the electors as a Mahatma, such representations if made by or on behalf of the respondent would amount to fraud and undue influence ".

It is to be noted that Counsel for petitioner did not allude to the description of petitioner as " a person believed by many persons to be a Christian ", and therefore we need not deal with this statement.

Our finding on this issue is that exhibit 1 does not amount to undue influence.

CASE No. LVII
Kistna (N.-M.R.) 1928
(MADRAS LEGISLATIVE COUNCIL.)

BOBBA VENTAKA SEHAYYA AND ANOTHER .. *Petitioners,*

versus

MIRZAPURAM RAJA GARU *alias* VENHATARAMAMYA
APPA RAO BAHADUR GARU AND OTHERS .. *Respondents.*

A petitioner must state at the outset the particulars on which his allegations are based. The court's power of amendment does not extend to adding a fresh instance not covered by the allegations in the petition.

The electoral roll is binding on an election court and its validity cannot be questioned. Undue influence alleged but not proved.

THE chief interest of this inquiry will be found in the two annexures. A very lengthy petition alleged a large number of corrupt practices chiefly on the ground that the respondent exercised undue influence upon the voters of numerous places by his "influence as a zemindar, his powers as president of the Kistna district board and his wealth". That he used his powers and authority as president of the board for his own end and corruptly and illegally employed the servants of the district board and taluk board under him. That he appointed several men to offices in the service of the district board just on the eve of the elections and made use of them as election agents for himself. That he also "transferred or otherwise manipulated the staff of the district board and taluk board for the purpose of advancing his interests in the elections". Besides he "held up the elections of the presidentships of certain taluk boards, and in the end, ignoring the members already in existence, nominated men of his own liking and conferred upon them temporary presidentships on the condition of the nominees working and voting for him in the elections".

Evidence was given to show that a schoolmaster named Battina Markandeyulu was transferred from Undi to Gudivada (although under orders of transfer to Idupagallu) for the express purpose of canvassing for the respondent among the Kalali community to which he belonged. In furtherance of this purpose he wrote certain letters. The first merely stated that their community should try to secure places on the local boards and concluded—"it is not possible to write about certain matters in this letter...do not allow these matters to be known to a third person".

The second letter stated "The zemindar of Mirzapur who is president of the district board, Kistna, is standing as a candidate at the Legislative Council election. He desires that the votes of the members of our community should be given to him. I have requested him to nominate you as a member of the district board. He sent for me again by telegram. For certain reasons Mareedu Gopayya had to be nominated in place of P. Ramalingam Garu. The zemindar has written to me to see that you meet him at once".

The letter then proceeded to state that a thousand votes should be secured; and certain gratifications by way of schools and roads would be given. "I have spoken about this matter and shall inform you in person how it may be possible to get these things done."

The Commissioners recorded their opinion that "if responsibility for these letters could be brought home to the respondent they would undoubtedly go far towards invalidating his election. The only conclusion to which we can come is that the contents of these letters have not been proved, and the petitioners have gone out of their way to bring them

into discredit ". They found that the transfer and the promotion of the schoolmaster " was in the ordinary course of business ". They also found that the nomination of new members of the board by the respondent was " a wise choice in the public interest which cannot be ascribed to any ulterior election motive ".

As regards the appointment of a certain person as acting manager of the Kistna district board, the respondent produced evidence to show that he was a most suitable person to be appointed. The Commissioners found that if this man " was properly appointed his subsequent activities do not concern us. Various witnesses say that he canvassed ; but even if he did let his zeal outrun his discretion, that is not a corrupt practice ".

The only specific charge of gratification which the Commissioners found sufficiently established to require a rebutter was that on the eve of the election the respondent and Mandala Ramaswami came to Kaza village and offered the villagers a culvert in exchange for their votes. " But it is proved that the culvert was already ordered by Mandala Ramaswami as president of the taluk board before the visit, which was not on the eve of the election. The respondent may have expressed his sympathy with the proposal and may even have promised one A. Sriramulu, that he would try and expedite it. But there is no reason to suggest that he made his good offices conditional upon getting the villagers' votes."

Delay in the local elections and the retention of the president during the interval before the district board was reconstituted was proved, but the Commissioners found that the delay was mostly on the part of Government, that the president was unanimously elected after the reconstitution of the board and that his retention during the interval " seems to have been a natural act in the practical interests of the administration. If he and others in his position supported the respondent it cannot be described as a corrupt practice ".

The Commissioners found that no corrupt practice had been proved to have been committed by the respondent or his agent, or with the connivance of the respondent or his agent ; and that no corrupt practice had been proved to have been committed by any person.

A preliminary issue was raised for determination whether the petitioners were entitled to add new instances by way of further particulars to the general charges set forth in their petition. This was found in the negative as set forth in annexure 1 to the report.

ANNEXURE 1.

The preliminary issue for our determination is whether petitioners are entitled to add new instances by way of further particulars to the general charge of corruptly employing board servants.

Subsequently an additional particular was appended. "Mateti Satyanarayana, headmaster, Kaikalur high school, canvassed", etc. and to this in the petition of 18th April, 1927 respondent objects.

Rule 33(2) of the Madras electoral rules provides that the petition shall be accompanied by a list setting forth full particulars of any corrupt practice which the petitioner alleges, including as full a statement as possible of the names of the parties alleged to have committed any corrupt practice and the date and place of the commission of each such practice.

Then rule 33(3) enacts that the Commissioners may allow the particulars in the said list to be amended or order such further and better particulars in regard to any matter referred to therein to be furnished.

The latter part of the rule does not concern us here. The name, date and place in regard to any particular in the list may be stated better or more fully.

The question is whether amending the particulars in the list means merely correcting them, or may include adding to them by the substitution of entirely new particulars.

Divergent views on this point have been held in *Lahore* and *Bombay*. In *Lahore* it was ruled that petitioner could be allowed to give further details with regard to the instance referred to in the original list, but not to introduce fresh instances. "It would be straining the language of the rule to hold that the word 'particulars' includes fresh instances of a similar kind." In *Bombay*¹ it was held (see page 178) that the addition of further particulars of the same charge—personation with connivance—does not constitute the making of a further charge of corrupt practices, but only gives further instances of the commission of the same charge. It is in fact an amendment of the particulars of the corrupt practice which was originally alleged.

This would be quite comprehensible if "particulars" in this last sentence meant "list of particulars" which in some contexts it might mean. If the rule ran that the Commissioners could allow the list of particulars to be amended, then clearly, as the Bombay Commissioners observe, the particulars of the corrupt practice originally alleged might be added to by way of amending the list.

The rule however does not say list of particulars but, in very precise terms, particulars included in the list. Adding to the particulars included in the list is not amending them; those original particulars are left just as they stood, quite unamended; but new ones are added. It may happen to be an amendment of the list but not of the particulars.

¹ Bombay City (M.U.), 1924.

English rulings in the matter are not of much assistance, because it is the Madras rule which we have to interpret; but as it is often the endeavour of the draftsman in India to reproduce the sense of the English law, the accepted English interpretation should at least put us upon our guard if it ran counter to our view. This precise point with regard to particulars does not seem to arise in England. The general principle which the courts there follow is that no amendment can be allowed after the lapse of the prescribed time which would amount to constituting a new petition. To introduce what is substantially a new charge is not allowed (Rogers, volume III, 1906, page 290; *Maude and Lowley*, L.R. IX C.P., 165), while the power to make amendments which presumably do not constitute a new charge is reserved in *Alridge vs. Hurst*, L.J., Q.B. 45, at page 436. If the Madras rule were to the effect that any amendment not constituting a new charge might be allowed, the English rulings would be directly in point. But as the language of the rule is otherwise, the English rulings are of little assistance. In Halsbury's "Laws of England" it is submitted that the court's power of amendment does not extend to adding a fresh instance not covered by the allegations in the petition. If allegations here mean particulars set forth in the schedule, this would conform to an interpretation of the Madras rule (Halsbury, volume 12, page 413).

Whether with regard to rule 33(2) a petitioner can subsequently add fresh particulars on the plea that this earlier statement was impossible, is not a question which we have to determine, because there is no plea of impossibility before us. But it may be observed in this connection that under rule 33(2) the petitioner has to set forth full particulars of any corrupt practice which he alleges, and it is only with reference to the name, place or date that it is provided that his statement must be as full as possible. He may set forth that John Smith treated and plead that he found it impossible to get the name of William James whom he treated. He cannot plead that at the time of presenting his petition it was impossible to get any particulars of treating at all; but subsequently he has discovered that John Smith treated. If that plea were allowed there would be no object in prescribing under rule 33(2) a list setting forth full particulars. A list might be presented at any subsequent date with an affidavit alleging the impossibility of earlier discovery. And, of course, unless the general charge was a mere random shot, the petitioner must have known some particulars before making it. This covers the plea of the petitioner that in regard to alleged malpractices by agents he could not know whether the persons were agents till after the publication of the candidates' expenses. A petitioner must state at the outset the particulars on which his allegations are based; if he subsequently finds that they are unfounded, he can always amend such particulars by striking them out.

ANNEXURE 2.

The question for determination is whether the petitioners are entitled to question the validity of the electoral roll as finally settled by the revising authorities.

In paragraph 5 of the petition, it is alleged that in the Bezwada and Nuzvid divisions, notably in the 1st respondent's zemindari of Mirzapur estate, and in the villages amenable to the influence of himself and his zemindari and mokhasadar relatives and friends, persons not entitled to be on the electoral roll were introduced therein and consequently the voters of many villages were fictitiously increased in some cases to 15 or 20 times the number in the previous lists and that the total number of voters was thus augmented from about 1,500 to between 3,000 and 4,000, a circumstance which is without parallel in any other taluk or division in the constituency and that the increase was illegal and improper, in that the new voters are mostly members of joint families not holding pattas in their own names or possessing other qualifications, and that in some places Christian voters were brought on the rural list and that the vast bulk, if not all, of these voters cast single votes for the 1st respondent, that one of the candidates Mr. C. K. Reddi objected to such an arbitrary expansion of voting lists before the revising authorities of Bezwada and Nuzvid composed of the revenue divisional officer and two non-officials, but that the board did not pay heed to the matter or correct the final lists as prayed for, and that accordingly the election of 1st respondent has been vitiated by the inclusion of unqualified persons as voters. Some particulars were set forth in the list of particulars, and on further particulars being ordered it was stated that the objection to the voters specified was that they do not possess the qualifications prescribed by the rules, and not that they are subject to any disability stated in rule 7 of the Madras electoral rules.

The returned candidate denies the allegations and it is urged on his behalf that the electoral roll is final and conclusive.

The Christian voters alleged to have been brought on the roll are very few and, even if their votes are struck off, the result of the election would not be affected.

It has therefore to be considered whether, in respect of the other voters, the improper entry of whose names is alleged to have been procured by the returned candidate, it is open to us to go behind the electoral roll and inquire into the question of their possessing the necessary qualification.

Procuring the improper entry of any name in the electoral roll is not an offence under the Indian Elections Offences and Inquiries Act, 1920, nor is it a corrupt practice under the Madras electoral rules. Under clauses (3) and (4) of rule 9 of the Madras electoral rules the orders of

the revising authority are final, and the electoral roll as amended in accordance therewith is to continue in force for a period of three years unless the Local Government directs the preparation of a fresh roll before the expiration of that period. Then clause (i) of rule 10 provides that every person registered on the electoral roll for the time being in force for any constituency shall while so registered be entitled to vote at an election of a member or members for that constituency if he is not subject to any disability stated in rule 7. It follows, therefore, that a person whose name is on the roll, whether rightly or wrongly, is entitled to vote, and clause (2) of rule 10 provides that his vote will be void only if he is proved to be subject to any disability. The effect of these rules is to make the electoral roll conclusive except in cases of disability set forth in rule 7, and to preclude us from enquiring into the question of a voter's possessing the necessary qualification. The matter is so obvious that it will be superfluous to refer to the numerous English and Indian decisions in which the same view has been taken.

It is, however, urged on behalf of the petitioners that the revising authorities did not scrutinize the claims of these persons for inclusion in the electoral roll properly, and that clause (c) of rule 44 (1) which provides among other things that if in the opinion of the Commissioners the result of the election has been materially affected by any non-compliance with the provisions of the Act or the rules and regulations made thereunder, the election of the returned candidate shall be void, entitles us to go behind the electoral roll and inquire into the question. Under regulation 13 of the regulations for the preparation of the electoral roll, the revising authorities have to make such inquiry as they think fit, and it is not suggested that they refused to hear any objections or failed to make any inquiry whatever. Further, the vote of a person whose name is on the roll can be struck off only when he is proved to be subject to any disability stated in rule 7, and rule 44 (1) (c) does not override the definite provisions of rules 9 and 10 which deal specifically with the finality of the orders of the revising authorities and the validity of the vote of a person whose name is on the roll, whether rightly or wrongly. It follows that the jurisdiction conferred on us by rule 44 (1) (c) is limited by the definite provisions of rules 9 and 10, and that it is not open to us to go behind the electoral roll and inquire into the question of a voter's possessing the necessary qualification. The validity of the electoral roll cannot therefore be questioned in this proceeding.

CASE No. LVIII
Kolaba District (N.-M.R.) 1927
(BOMBAY LEGISLATIVE COUNCIL.)

MR. NARAYAN LAXMAN AGHARKAR .. *Petitioner,*

versus

MR. ATMARAM MAHADEO ATAYNE *Respondent.*

Failure to furnish additional security ordered by the Commissioners resulted in dismissal of the petition.

The fees payable to the Commissioners can be included in the costs of the enquiry.

UPON receipt of the petition Mr. Gosavi was joined as respondent no. 2 and he and Mr. Atavne both filed written statements. Subsequently, the parties were examined and issues were framed and Mr. Atavne filed recriminations as against the possible election of Mr. Gosavi. Lists of witnesses were then submitted. The petitioner submitted a list of 86 witnesses ; Mr. Atavne submitted a list of 104. In view of this fact, the president of the Commission, acting under rule 33 (2) (b) of the Bombay electoral rules, called upon the petitioner and respondent no. 1 to furnish security for a sum of Rs. 6,000 in addition to the sum of Rs. 1,000 deposited, and a bond for Rs. 1,000 which they had previously executed. Mr. Atavne, M.L.C., furnished security for Rs. 6,000 ; the petitioner has failed to do so, and it is necessary to consider what is the effect of this failure. We have heard the pleaders for the parties and consider that the petition should stand dismissed, and we most humbly make a recommendation to that effect. There is no express provision in the Bombay electoral rules for failure to give further security ; but under rule 36, clause 1, if the deposit of Rs. 1,000 is not paid as required by rule 35, " the Governor shall dismiss the petition ", That, in our humble opinion, is a very close analogy. Furthermore, it is laid down in rule 37 that the enquiry in the election petition shall be as nearly as may be in accordance with the procedure applicable under the Code of Civil Procedure to the trial of suits. Under order 17, rule 3 it will be found that the petitioner has failed to perform " any other act ", and so the Commissioners are entitled to proceed to determine the petition forthwith. Further analogy is provided in order 25, rule 2. It is true that this order is concerned with litigants who have no property in British India and failure to comply with the order for security entails dismissal of the suit. The analogy is strong because in this particular case, the petitioner pleads poverty. There has been a failure to comply with a legal order passed by the Commissioners, and the Commissioners are unanimously of opinion that the petition cannot proceed further.

It was argued further for the petitioner that the word " costs " cannot include fees to be paid to the non-official Commissioners. In demanding extra security of Rs. 6,000, the president had included fees for these two Commissioners. The term costs in section 4 (A) of Act XXXIX of 1920 is wide enough to include the fees of Commissioners. They are certainly a charge incidental to an enquiry. Nor can the amount of security be challenged in view of the numerous allegations of corruption and malpractices of all kinds which were alleged in the petition and in the recriminations. The president bears in mind that he had warned the parties from the outset that the fees of the two non-official Commissioners would be included in the costs of the petition. We understand that these fees of the Commissioners are regularly allowed to

Government in this presidency. We, therefore, recommend that the petition be dismissed with costs and the petitioner should pay Government Rs. 900 towards the expenses incidental to the setting of the tribunal, and that he should pay respondent no. 1 a sum of Rs. 300 towards the cost of the petition including the pleader's fees. The petitioner must bear his own costs. We further recommend that respondent no. 2 should bear his own costs.

CASE No. LIX

Kyauksè (G.R.) 1933

(BURMA LEGISLATIVE COUNCIL.)

U. SEIN BA *Petitioner,*

versus

U BA YI
U SAN PE
U YA ZA

} *Respondents.*

Spiritual coercion on a large scale with the connivance of the candidate was proved. Held, that the election was not a free one by reason of the exercise of undue influence. The election was declared void.

The circulation of misleading literature and the making of misleading speeches would not alone avoid the election.

The boycotting of voters was declared to be undue influence and a corrupt practice.

THE corrupt practices alleged in the petition, on which most stress has been laid come under the heading of "undue influence".

(1) *Documentary* by circulation of leaflets containing false or misleading statements ;

(2) *Oral* by *pongyis* (i.e. Buddhist monks) and lay lecturers ; and

(3) By boycott.

The issues framed were .—

(1) Has the election not been a free one by reason of the large number of cases, in which undue influence within the meaning of part I or part II of schedule IV has been exercised or committed ?

(2) Has the election of the returned candidate been procured or induced or the result of the election been materially affected by corrupt practices ?

(3) Have any of the corrupt practices specified in part I of schedule IV been committed ?

As regards undue influence by means of documents it is clear that shortly before the election the district was flooded with misleading literature of the most important of which exhibit A is a copy.

We are of opinion, however, that what contributed even more to the success of the anti-separationist candidate U Ba Yi was the stressing and elaboration by speakers, almost all clerics, of certain prominent points from the leaflet A, such as the subordination of Buddhism to Christianity, the prohibition of storing more than a seven days supply of rice, and the imposition of vexatious taxes on dogs and other animals.

The allegations in exhibit A were supplemented in speeches by categorical assertions regarding the taxation of Buddhist monks, the strict limitation of the numbers of ecclesiastical dignitaries and their direct control by the Governor under the Crown Colony regime.

At the same time we are satisfied that some of the misrepresentations in question were due to *bonâ fide* mistakes and were not essentially dishonest, though others were palpably false and known to be so by the makers.

Taking the circumstances as they stand, we are not prepared to hold that the circulation of misleading literature and the making of misleading speeches alone would justify a finding that the election was not a free one.

The evidence regarding the boycotting of electors, however, stands on a very different footing.

Maung Pein, witness no. 11 for the petitioner, a vendor of edibles of Puttaing, deposed that the villagers refused to buy his wares, and his own relatives refused to have any dealings with him because he was an avowed separationist.

He made a report to the police.

His evidence is corroborated by the next witness Maung Tun Maung, a schoolmaster of Puttaing, who was himself boycotted and had to move his school to another village. This witness gave the name of three other co-villagers who were boycotted in consequence of their political views, but they themselves were not cited as witnesses, a fact at which there is no occasion for surprise.

Saya Kaing of Kyaungbangôn, witness no. 9, was similarly boycotted by the villagers and some monks. He also made a report to the police.

Witness no. 19, Maung To of Shwebawgyun gave evidence that he was the subject of an ecclesiastical boycott in consequence of his separationist views. The monks in the vicinity declined to attend the funeral of his aunt and he had to call in a monk from a distance to officiate. The boycott was extended to his son's funeral, apparently after the election.

Practically no attempt was made to rebut the evidence of boycotting and we see no reason whatever to doubt its truth.

There is in addition extremely cogent evidence of intimidation by Buddhist monks, which is the more compelling because it was not expected. There were no specific allegations on the point in the petition.

The intimidation took the form of administering an oath to electors.

The first witness to give evidence of this form of undue influence was Maung Pein (no. 11).

According to him U Thawbita administered an oath to the villagers from Puttaing and neighbourhood at Nyaung-ywe on the polling day.

The effect of the oath was " If I vote for U Ba Yi may I go to heaven, and if I vote for U Sein Ba may I be sent to hell ".

U Thawbita gave evidence flatly contradicting Maung Pein, but we were not impressed by his demeanour and cannot trust his veracity.

Maung Mya Din, witness no. 16, deposed that U Thawbita, since deceased, administered a similar oath to him and the villagers of Myaung-son-gyi after threatening to refuse their offerings in future, if they declined. This was about a month before the election.

Maung To, the witness (no. 19) who was boycotted by the monks, described how the presiding monk of the village monastery, U Ahseinda, declined the offerings of the villagers, who would not go over to the anti-separationist side, and sent away their children from his school. When they apologised, the monk told the villagers they would have to take an oath to vote for the anti-separationist candidate. The witness did not himself stay to take the oath; but was told by the others, who did, that the oath was duly administered.

U Ahseinda was not cited as a witness for the defence, and the evidence as to the exercise of undue influence by him and U Thawbita must be accepted.

There is, up to this point, no proof that any of the respondents connived at these practices.

The most striking evidence of all, is that of U Wimala, himself a monk from Myittha, the last witness for petitioner, who deposed that on the polling day he with five other monks accompanied the villagers to the polling station, to see that none of them voted for petitioner, and on the way made them take an oath to vote for U San Pe. The nature of the oath was that, if they voted for U Sein Ba, they would go to hell, but, if they voted for the anti-separationist, they would attain *nirvana* or infinite bliss.

The witness further visited four other specified villages and instructed the *pongyis* there to swear their villagers to vote for anti-separation and San Pe, but in any case for anti-separation.

He himself administered the oath to the Yitkan villagers.

U Wimala deposed further that he administered the oaths with the consent of the candidate U San Pe. Subsequently, after reading the leaflet issued by the Deputy Commissioner, witness became doubtful as to the propriety of his conduct, which was why he came forward and gave evidence.

In view of U Wimala's evidence a telegram was despatched to U San Pe to attend the inquiry at a later date but he put in no appearance.

None of the monks from the villages mentioned by the witness were cited for the respondent U Ba Yi.

There was considerable general corroboration of the shepherding of electors to the poll.

U Kin Maung, a well-to-do miller of Singaing (witness no. 10) stated that at the Thitkauk polling station he saw the villagers from each village come to vote accompanied by their *pongyis*.

The voters had to stay with their *pongyis* and as each voter's name was called out, he went up to vote.

U Kyaw Pe, manager of the co-operative bank, Kyauksè, visited the polling stations at Minzu, Dayegaung, Kyauksè and Belin, in the interests of petitioner. At each of them he saw the villagers accompanied by *pongyis*, who had lists in their hands, which they were checking and by which they were sending the villagers to vote.

U Hmin, a landholder of Nwashayo, gave similar evidence regarding parties, who came to vote in charge of *pongyis* from four different villages.

His evidence that U Wimala was the first person to address them on the question of separation and invited them to vote for U San Pe, who (he said) could be trusted as he had taken an oath corroborates U Wimala's evidence concerning the administration of an oath to U San Pe.

The witness's account of other observations of the speaker regarding fresh taxes and injury to Buddhism in the event of separation is also in accordance with the tenor of U Wimala's own evidence.

We have no hesitation in accepting U Wimala's evidence in its entirety.

The administration of an oath of the nature in evidence to a voter by a Buddhist monk is clearly an interference with the free exercise of the electoral rights within the meaning of paragraph II of schedule IV, part I.

On U Wimala's evidence alone the election is void.

The evidence generally tends to show that on the anti-separationist side not merely was free use made of the boycott as a weapon of compulsion, but that there was spiritual coercion of voters by Buddhist monks on an extremely wide scale.

It is difficult to believe that the respondent U Ba Yi was wholly unaware of these happenings, which took place, it would seem, quite openly in the majority of instances.

We find on the issues fixed accordingly—

- (1) that the election has not been a free one by reason of the large number of cases in which undue influence within the meaning of part I and part II of schedule IV has been exercised ;
- (2) that the election of the returned candidate was materially affected by corrupt practices ;
- (3) and that undue influence, being a corrupt practice, specified in part I, paragraph II of schedule IV, has been exercised by U Wimala.

In view of the extensive coercion of voters and the fact that the election was not a free one, it is impossible to say that petitioner would have been elected had no undue influence been exercised.

It is our duty to report therefore that the election is void and that no candidate has been duly elected.

With reference to rule 47 we have to record a finding—

- (1) that U San Pe, an unsuccessful candidate, connived at corrupt practices, namely the use of "undue influence" within the meaning of paragraph II of schedule IV, part I by U Wimala, *pongyi* of Shwemotaw monastery, Myittha ;
- (2) that the abovementioned U Wimala, as well as U Thawbita, *pongyi* of the Shwekyangdaik monastery, Singaing township and U Ahseinda of the Shwebawgyun monastery, have been guilty of corrupt practices, namely the use of "undue influence" by intimidation of voters, but that there is no evidence to show that U Thawbita and U Ahseinda acted with the connivance of a candidate or his agent.

U Wimala urges in extenuation of his conduct that he came forward to give evidence, freely admitted his malpractices and thereby assisted

the Commissioners in the enquiry. We recommend that he be exempted from any disqualification he may have incurred under the rules.

We see no reason to make any recommendations regarding the other persons, whose names have been recorded, and who deny the truth of the allegations made against them.

We assess the costs of petition at Rs. 900 and recommend that they be paid as follows :—

By the 1st respondent, U Ba Yi	..	..	Rs. 600
By the 2nd respondent, U San Pe	..	..	„ • 300

CASE No. LX

Lahore City (M.) 1921

(PUNJAB LEGISLATIVE COUNCIL.)

MALIK BARKAT ALI *Petitioner,*

versus

MAULVI MUHARRAM ALI CHISHTI .. *Respondent.*

Spiritual intimidation alleged, but not proved.

General intimidation, directed against both sides, did not create the presumption that the result of the election had been materially affected.

English and Indian law of elections compared. Indian statutory law is intended to be complete in itself.

THE election was impugned on the grounds of general intimidation of voters and of the exercise of spiritual influence in the way of threats by certain Pirs on the inducement of the respondent and his agents.

A preliminary question, bearing on the interpretation of Punjab electoral rule 31, was disposed of by an intermediate order, dated 28th January, 1921, a copy of which formed an annexure to the report.¹ On the remaining issues involved the Commissioners reported as follows :—

It will be convenient first to dispose of the matter of the exercise of spiritual influence. The petitioner has entirely failed to convince us either that any such spiritual influence as would come within the definition contained in rule 2 (2) (b) of part I of schedule IV of the Punjab electoral rules, was exercised or that, even if such an influence was exercised, it was induced by the respondent or his agents. The definition in question falls under the heading of undue influence and runs thus :—

“ Any threat to a person or inducement to a person to believe that he or any person in whom he is interested will become or be rendered an object of divine displeasure or spiritual censure.”

We have had a certain amount of evidence placed before us to show that three Pirs, by name Pir Jamaat Ali Shah of Alipur, Mirza Bashir-ud-din, Mahmud of Qadian and Maulvi Ikram-ud-din, Bukhari of Lahore, addressed their respective followers on behalf of the respondent. But there is no evidence worthy of credit that any such address contained or was intended to contain any such threat or inducement as is alleged by the petitioner or is contemplated by the rule.

As regards Pir Jamaat Ali Shah, there are only two direct witnesses ; all they are able to say is that when the Pir was sitting one day in the Patolianwali Mosque, the respondent approached him with a request that he would ask his *murids* to vote for him. The Pir responded by asking those present to vote for the respondent. The attendance of the Pir himself could not be obtained, and he was given up as a witness by the petitioner. There is no trace of threat here.

As regards the Mirza of Qadian, the petitioner relies on a letter, dated 17th September, 1920, addressed by a secretary of the Mirza to the secretary of the local Ahmadiyya community (exhibit P.B.), but it is quite impossible to regard the expressions used in this letter as denoting more than a wish that that community should support the respondent ; there is nothing even approaching a threat or inducement. With a view to indicating generally what in our opinion comes within the bounds of legitimate canvassing by a spiritual leader we reproduce a translation of this letter below :—

¹ This annexure is not reprinted.

“It is understood that Mr. Chishti is a candidate for the Punjab Council for Lahore and its environs. Our Hazrat has approved of him, and I have been directed to invite you to turn your attention as well as that of the president of the Lahore Ahmadiyya community to an endeavour to have votes given for Mr. Chishti by the members of the Ahmadiyya community of Lahore. A separate letter has been addressed to the president of the Lahore community. Please issue necessary instructions for the community after consulting him.”

There is nothing here to which exception could possibly be taken. The only action taken by the local secretary, P.W. 37, was to circulate a copy of the letter to 83 persons, whose names appear in his register, but it is not even known how many of these were actually voters. Upon this point there are only four direct witnesses, of whom one, P.W. 38, is admitted by the petitioner himself to be unreliable, two others, P.Ws. 34 and 37, admit that no threat of spiritual censure was held out to them, while the 4th witness is the Mirza himself, P.W. 39, who states that he had no intention that the letter should be a threat or inducement, and further that, in secular matters, his followers are at liberty to take his admonitions as recommendations only. As a matter of fact, we have it from the register before mentioned that two of his followers went the length of recording vigorous objection to voting for the respondent.

The position taken up by the petitioner is that, even though no actual threat was held out to any one by the two Pirs above-named, yet the effect of the instructions, which they gave to their followers, would be such as to produce on the minds of those followers the fear that they would be committing a sin if they did vote for the respondent, drawing a further inference therefrom that the incurring of divine displeasure would result from the commission of this sin. In our view this position is quite untenable, if only because, when it is sought to bring home a corrupt practice to any one, it is the action of that person which must be primarily looked to; corrupt intention is the essential element and no such intention has been shown as regards these Pirs. The question of what the persons addressed thought is a secondary one and does not arise if no corrupt intention on the part of the Pirs is shown. But, even apart from this, we are not satisfied that the persons addressed would all, or even in the majority of cases, consider that it would be a sin not to vote in accordance with the recommendation of a Pir. There is some evidence to show that ignorant and over-credulous persons might so consider it, but even of that there is not sufficient to convince us that this is really the case. At the same time, we think that candidates should exercise great caution in invoking the aid of spiritual leaders to assist their candidature, and that spiritual leaders themselves, before addressing their followers, should weigh very carefully the effect which their words would have upon each and every section of such followers.

The third case is that of Maulvi Ikram-ud-din Bukhari, whose statement has been taken on interrogatories at Gwalior ; he denies the allegations made against him. This person is not a regular Pir ; he admits that he has only four or five *murids* in Lahore ; he was for a long time the Imam of Wazir Khan's mosque in Lahore and he is said to have offered prayers for the success of Mr. Chishti. We have it in evidence that, as regards the alleged preaching at the Salabat mosque, the action of the Maulvi was resented by his hearers, many of whom condemned his action in so speaking, declaring that they would not vote for Mr. Chishti. As regards the alleged preaching at Wazir Khan's and the Sunnehri mosques, the witnesses are so few and of such low status that we could not act on what they say.

These findings render it unnecessary to discuss the question whether the respondent or his agents induced the Pirs to exercise any influence on the respondent's behalf and we content ourselves with repeating that we find such inducement entirely unproved. This part of the petitioner's case therefore fails.

Turning to the question of the alleged general intimidation we find a considerable body of evidence to the effect that on polling day crowds assembled at many of the polling-stations and adopted a hostile and threatening attitude towards voters : in a few cases actual violence was resorted to towards persons who had voted, but these instances are admittedly few in number, though it is somewhat cogently argued that this fact proved the success of the methods of intimidation employed. It is further admitted that the campaign of intimidation was directed against all voters, no matter for whom they might have been going to vote, and was organized by a political body known as non-co-operators. Now we are perfectly prepared to find that the evidence tendered by the petitioner would, if not rebutted by the respondent, have proved that there was general intimidation on a fairly large scale, but we did not consider it necessary to call upon the respondent to produce rebutting evidence since, in our opinion, the petitioner had failed to make out a case for avoidance of the election by the evidence which he placed before us. There are two main factors which have influenced us in coming to this decision. Firstly, the case is rendered peculiar and *sui generis*, so far as we are aware, by the fact that, since the intimidation was directed against both sides equally, it is impossible to say that the petitioner was affected more than the respondent : secondly, we are quite unable to ascertain even approximately how many voters actually went to the polling stations for the purpose of voting and were deterred from doing so, and how many never approached the polling stations. Ordinarily no doubt a considerable percentage of persons on the electoral roll would go to vote, but here we have this complication that the non-co-operation movement, which had been in progress by non-violent

methods for many months before the polling day, had already admittedly affected many voters to the extent of inducing them to determine to refrain from voting at all.

On this point we have some concrete evidence from statistics. Out of the 7,080 registered voters for this constituency 458 valid votes were cast, amounting to 6·5 per cent. only. In the election for Amritsar City (Muhammadan) constituency, where it is not contended that there was any violence yet admittedly non-co-operation was also strong, out of 3,718 registered voters only 32, or 2 per cent. voted. The comparison is significant as showing that the small percentage of votes cast in the Lahore election may have been due to non-violent non-co-operation alone. Again, out of the 10 polling stations for this constituency, general intimidation is not alleged at all at two, namely, at one of the Mozang Stations and at Lahore Cantonment. The percentage of voters polling at these two places was only 6 per cent. and 13 per cent. respectively. The case of Lahore Cantonment is of course no index for Lahore City, but the second Mozang Station certainly is, and here, out of the petitioner's figure of 300 voters, only 2 came to the poll. As regards other polling stations, with the exception of the other Mozang Station, where there was remarkably heavy polling up to noon and no less than 40 per cent. of voters cast their votes, the percentages were, 3, 1·6, 2, 6, 3, 1·8 and 8·6. In Mozang the heavy voting is said by the petitioner to have been mainly in the respondent's favour: if this is true, it might well be argued that the respondent might have done equally well at other polling stations and we have certainly no reason to suppose that he would not.

Assuming it to be a fact, however, that there was general intimidation of voters, the petitioner's position may be thus stated:—

He points out, in the first place, that in England such general intimidation is not provided for by the statute law but is dealt with under the common law, under which it is by itself a specific ground for declaring an election void, if it be shown that the result of the election may have been affected: and, secondly, that in England Statute Law only fills up the gaps in common law, which can be applied independently of the statute. From these two propositions he argues that, since election law in this country is imported from England and based on the English Law of Elections, we should take it that the Indian Statute Law thus imported brings with it the provisions of the English Common Law, which should, in matters dealt with by the English courts under common law, be applied in India also.

In the alternative, he argues, though without much conviction, that if Indian Statute Law be held applicable and it consequently becomes necessary to find not only that there was undue influence as defined in rule 2 of part I of schedule IV of the Punjab electoral rules, but also,

since the case falls under rule 1 of part II of the same schedule, that the result of the election has been materially affected, he has established the fact of general intimidation of voters, and that the burden of proving that the result of the election was materially affected should no longer lie on him, but, that, following the principle laid down by us in the *Rohtak* case, we should require the other side to prove that the result of the election was not materially affected.

With regard to the first position, we have had the advantage of hearing an exposition of the history and application of English Common Law from Mr. Carden Noad, Government Advocate, but we do not think it necessary to dilate upon it here because, in our view, the matter is not open to serious doubt. The petitioner is able to advance no authority or precedent whatever for the somewhat remarkable conclusions which he wishes us to draw from the two propositions which we have stated. It is at least arguable in the first place, whether we should allow that English Common Law which is essentially personal in the application of its provisions, should be applied to persons who are of a different nationality and who have a definite personal law of their own.

It may be true that Indian Election Law is based on English Election Statutes, but it differs from English law widely in numerous particulars and should be regarded as a separate corpus, the Indian Legislators having adopted some and discarded others of the English Election provisions. It seems to us that the Indian Legislature intended to make their statutory provisions complete in themselves, and there is nothing whatever to indicate that there was any intention that the Indian courts should administer English Common Law provisions.

This is quite a different thing to saying—and this is certainly a proposition for which there is authority—that, in default of any provision in the statute law, the Indian courts may fall back on the principles of English Common Law. Principles are entirely different in essence to specific provisions and the English Common Law principles are only adopted, as we understand the law, in this country, because they are considered to represent the principles of justice, equity and good conscience, upon which the law, as a whole, is to be administered. But these principles even can only be utilized where no statutory provision exists, and in the present case, we have no doubt that such provision does exist. English Statute Law only contemplates the avoidance of an election by reason of the acts of a candidate or his agents, and there is no rule of English Statute Law corresponding to that contained in rule 1 of part II of schedule IV of the Punjab electoral rules, which makes it possible to avoid an election on the ground of the action of persons unconnected with the candidates or their agents, provided always that the result of the election has been materially affected thereby [Punjab electoral rule 42 (1) (a)].

It seems to us that there exists so clear a provision in the Indian law enabling us to deal with the facts of this case that the question of the application of English Common Law need not be further considered, but we may add one further observation. Even if English Common Law were to be applied, it is only established by it that, on the one hand, if general intimidation has been of such a general character that it *may* have affected the result of election, then the election is void (*North Durham* case (2 O'M. & H., 156), that, on the other hand, even where there was an organized system of intimidation, if it was proved that it was practised not by persons acting in the interest of the respondent but against him and in the interest of the other candidate, the election would not be avoided (*Sligo* case, 1 O'M. & H., 300).

There is no precedent for dealing with a case of the kind before us, where, even if it be assumed that the result may have been affected, neither of the parties can be shown to have suffered more than the other.

We have then to see whether the intimidation exercised has materially affected the result of the election so as to avoid it under Punjab electoral rule 42 (1) (a). Obviously on the facts, as claimed by the petitioner to be proved, we cannot do so owing to the imponderable nature of the two essential elements, namely, (1) How many voters had not been won over by persuasion by non-co-operators before polling day and did actually go to vote? On this point we have quoted figures to show that, whatever effect was produced on the numbers voting, it is possible, and even probable, that it was produced by non-violent non-co-operation and not by intimidation, and,

(2) How many of the deterred voters would have voted for the petitioner, and how many for other candidates? On this point we regard as valueless the mere conjectures made by some of the petitioner's witnesses.

Nor can we accept the petitioner's contention that we should shift on to the respondent the burden of proving that the result of the election has not been materially affected. In order to do this, we should have to find that a presumption had been created by the petitioner's evidence that the result had been materially affected by intimidation, but here, although we might, on the petitioner's evidence, if unrebutted, have been justified in presuming that the result *may* have been affected, we certainly could not, owing to the existence of the uncertain factors already stated, presume that it *has* been affected. Herein lies the difference between the English Common Law, if it could be applied,—as we have shown it cannot—and the Indian Statute Law, which we must apply: the former only requires the creation of a presumption that the result may have been affected: the latter requires the creation of a presumption that it *has* been affected.

The petitioner thus fails on both his contentions and we would therefore humbly advise His Excellency the Governor of the Punjab by this report that the returned candidate has been duly elected.

In awarding costs, we take into account the facts, among others, that the petitioner had reasonable grounds for seeking a decision on the question of general intimidation, and that the respondent incurred no expenses for witnesses, while he was, except on the preliminary point, his own Counsel in the conduct of the case. We award the respondent a lump sum of Rs. 300 to be paid to him by the petitioner. •

CASE No. LXI

Lucknow *cum* Cawnpore (M.U.) 1927

(UNITED PROVINCES LEGISLATIVE COUNCIL.)

SAIYID ZAHUR AHMAD *Petitioner,*

versus

HAJI HABDUL QAYYUM *Respondent.*

Personation alleged but not proved. Onus lies on petitioner.
Mens rea of the agent is an essential ingredient in personation.

IN this case the petitioner attempted to prove the personation of three persons. The first case was that of a man named Mohi-ud-din, entered as no. 570 in the electoral roll of the Patkapur polling station, Cawnpore. When he arrived on the date fixed for polling, Mohi-ud-din found that someone else had voted in his place. The agents of the petitioner identified him on an identification slip and he applied to vote and was then allowed to put in a tendered vote. It was proved that the signature on the identification slip of the man who voted first was that of Said-ur-Rahman, called the Said Sahib, who was held to be an agent of the respondent. The facts were, therefore, that two persons presented themselves to vote in the name of the voter, Mohi-ud-din of Patkapur. The first was identified by the agent of the respondent, and the second by the agent of the petitioner. The Commission had to decide which was the man really intended in the electoral roll. There was plenty of evidence to show who the two men were and which was the real voter. The petitioner said that the true voter, i.e. the man identified by his agent, is Mohi-ud-din, the brother of Moin-ud-din.

"The evidence on the file clearly proves Mohi-ud-din, the brother of Moin-ud-din, was not, and could not have been, the voter, entered as no. 570 in the electoral roll of Patkapur, and that petitioner's agent was himself mistaken in identifying him as that voter.

"The evidence, on the other hand, leaves no doubt that the Mohi-ud-din who lived in the house no. 19/1216 of Patkapur voted for the Haji Sahib. The voter identified by Said-ur-Rahman, the agent of the respondent, was, therefore, the true voter."

The second case was that of Shahzade Mirza who was identified by Faridoon Mirza, probably the respondent's agent, though the Commissioners considered it unnecessary to take evidence on that point. Shahzade Mirza, the man who actually voted, gave evidence. The petitioner's contention was that this man personated one Mirza Mohammad Muzaffar Ali in the name of Shahzade Mirza. The Commissioners were unable to find that under the description given in the electoral roll Mirza Mohammad Muzaffar Ali was the voter. The Commissioners noted, "We are disposed to think that Mirza Mohammad Muzaffar Ali could hardly have been put down by the persons who were responsible for preparing the electoral roll as a resident of that mohalla."

The man who voted for Shahzade Mirza admitted that when he applied for the voting paper he believed that he was the person referred to in the electoral roll and that the father's name was a mistake. "Even accepting all that the witness says, there is nothing to show that Faridoon Mirza was of a different mind. All that he is proved to have said to the witness was that the father's name was a mistake and others also gave their votes although their fathers' names did not tally. We accordingly

find that in this case no *mens rea* of the agent was proved, which is an essential ingredient in personation. We therefore find that no personation took place."

The third case related to voter no. 258 in the electoral roll, the name of the voter being given as Bashir, his father's name Mohammad Yakub, and his residence mohalla Katra Khoda Yar Khan. The identification slip of the voter bore the thumb-impression of the voter, instead of his signature, and showed that the person who had cast the vote was illiterate. The petitioner's case was that one Bashir, son of Rasul Bux, lived in this mohalla. He was literate and signed his name. He was entered as voter no. 258 in the roll, but had not voted, as his father's name was not correctly given and Mohammad Yakub was his brother. No other Bashir lived at Katra Khoda Yar Khan at the time of the election and it therefore followed that somebody else personated the man at the election and had cast a vote in his name. The petitioner did not make any attempt to prove as to who had actually cast the vote.

"Now, there is a presumption that the electoral roll has been correctly prepared, and if anyone says that it is wrong in any particular he must prove it strictly. In other words, the onus lies heavily on the petitioner to show that no voter named Bashir, son of Mohammad Yakub, lived in Katra Khoda Yar Khan at the time of the last election, and that the authorities who prepared the electoral roll meant Mohammad Bashir, son of Rasul Bux. The petitioner relies on the oral testimony of two witnesses, Fida Husain and Mohammad Bashir, who are not men of much status. Even if there had been nothing else against the witnesses we should have felt hesitation in holding the petitioner's case proved on such meagre evidence.

Mohammad Bashir says he was the voter no. 258 in the electoral roll. He admittedly lived in a village in the country, and when his brother Mohammad Yakub died $1\frac{3}{4}$ years ago, leaving a minor son, he came to live in his brother's house in Katra Khoda Yar Khan. It is very doubtful if such a person would be recognized as a voter. He did not even know that his name was in the list until he was asked to vote. He says that he refused to vote as his father's name was given in the roll as Mohammad Yakub. How under the circumstances he can positively say that he was the voter we fail to understand.

It is significant that witness was never canvassed by petitioner or on his behalf. Petitioner is a resident of Lucknow, and he and his agent were not likely to have overlooked Mohammad Bashir if he had been a voter.

We are clearly of opinion that the petitioner has failed to prove his case. He cannot possibly succeed on flimsy evidence such as he has adduced. Our duty, last, is to make recommendations as to the parties' costs. The contending parties are the petitioner, Saiyid Zahur Ahmad,

and the respondent, Haji Abdul Qayyum. Saiyid Zahur Ahmad loses the case, a case which he should never have brought based, as it was, in our opinion, on frivolities more than any real or serious ground. He must, therefore, bear his own costs. In the case of the respondent our disappointment was great when we discovered that he unnecessarily suppressed the fact that Said-ur-Rahman or Mr. Said was his agent at the Patkapur polling station, Cawnpore. We have referred to the circumstances already in the report which left no doubt in our mind that that was a fact. We are bound to make a distinction between an ordinary litigant and a man in the respondent's position, an aspirant to a seat in the Legislative Council. We recommend that the respondent do get only half his costs from the petitioner and bear the rest himself. We assess the total costs at Rs. 500, of which, therefore, petitioner should pay Rs. 250 to respondent.

In conclusion we beg to recommend that the petitioner's petition be dismissed, and he do pay to the respondent, Haji Abdul Qayyum, Rs. 250 for costs and bear his own.

CASE No. LXII
Madras (N.-M.) 1926
(COUNCIL OF STATE.)

MR. K. V. RANGASWAMY AYYANGAR *Petitioner.*

versus

DIWAN BAHADUR SIR S. R. R. ANNAMALAI
CHETTIYAR *Respondent.*

Where ballot-papers to be sent by post were marked by somebody other than the voter it was held that this in itself did not amount to interference with the free exercise of the voter's electoral right.

If a candidate resorts to corrupt practices to help a friend it does not necessarily follow that his own election is avoided.

To avoid an election on the ground that by reason of the large number of cases of undue influence the election has not been free, it must be proved that the corrupt practice has been committed in favour of the persons who had been elected.

THE voting for the Council of State was by post, the election being made according to the principle of proportional representation by means of the single transferable vote. The petitioner stated that the respondent through his agents got a large number of voters merely to put their signatures on the declaration forms. He then took charge of the voting papers, without permitting them to put in any marks there, and despatched them to the respondent in Madras, when the papers were marked and filled up at Madras under the instructions of the respondent. The petition stated that the respondent marked for himself *and for another* first and second preferences as he chose in the ballot-papers which came to his possession. On these allegations of fact it was contended that there had not been a free exercise by the voters of their franchise, and that there had been no free election by reason of the large number of cases in which undue influence had been exerted by and on behalf of the respondent.

It was argued by the petitioner that the case must be held to be governed by sub-clause (b) of rule 44, clause (1), rather than sub-clause (c), apparently because in view of the large number of votes obtained by the respondent it could not be claimed that by excluding a number of votes on the ground of their invalidity, the result of the election would be affected.

The Commissioners desired that the case should be argued on the assumption that they were prepared to accept the evidence on the petitioner's side at its face value, and they refrained from expressing any opinion on the truth or otherwise of the allegations of facts.

"Confining ourselves, therefore, to the application and effect of the rules, the first question is whether the evidence discloses any acts of 'undue influence' within the meaning of rule 2 of part I of schedule V. The learned Counsel for the petitioner pointed out that under that clause every interference with the free exercise of the electoral right amounts to undue influence, and under rule 30(c) the electoral right includes the right to vote as well as the right to refrain from voting at an election. He therefore contended that the evidence discloses two types of undue influence : (i) that even in cases where a voter expressed his wish to vote for the respondent, the respondent's men did not allow him to mark the votes himself but took away the ballot-paper from him and themselves put in the mark ; and (ii) that in certain cases, the respondent's men filled in the second, third and fourth preferences in favour of other candidates without the authority of the voters or even contrary to their instructions. We are not satisfied that in the first class of cases it could be said that there had been any interference with the free exercise of the electoral right. It may be that a voting paper which is marked not by the voter but by somebody else is invalid as a vote, but if the

voter permits the mark to be put in by somebody else, and the vote is marked in favour of the person for whom he expressed his intention to vote, it is difficult to see how his freedom of voting has been interfered with. It has been contended on behalf of the petitioner that, though in the marginal note to rule 2 the words 'undue influence' are used to indicate the classes of cases dealt within that rule, we ought not to import into the rule the definition of 'undue influence' that obtains in the Law of Contracts. We accept this argument, but it has nevertheless to be shown that the voter's freedom in the matter of the exercise of his electoral right has been in some way interfered with. We are not prepared to hold that the mere fact of somebody other than the voter putting in the mark on the voting paper itself amounts to an interference with the free exercise of the voter's electoral right, irrespective of the question whether or not the mark was put in conformably to the wishes of the voter.

"The second type of cases has caused us greater difficulty; but we are prepared to assume for the purpose of argument that such conduct may amount to undue influence. It is however clear from the evidence that in this class of cases the undue influence, if any, has been exercised, not for the purpose of securing the return of the respondent, but to secure the return of his friends. It has been argued that, even on this footing, the case falls under sub-clause (b) of rule 44(1), the language of which is quite general and absolute, and it is not required for the purpose of the application of that rule that the corrupt practice must have been resorted to for the purpose of securing the election of the respondent. In answer to the argument based upon the generality of the language of the rule, it was pointed out that on the literal wording of the rule it may follow that, if a corrupt practice is shown to have been resorted to by a defeated candidate, the election of the successful candidate will have to be avoided. The learned Counsel for the petitioner was not prepared to go to that length. He conceded that from the very nature of the provision and from a consideration of other provisions in the rules, it may reasonably be implied that the corrupt practice must have been committed by the returned candidate or by his agents: but he contended that once the returned candidate is found guilty of corrupt practices, the rules have, on grounds of public policy, laid down that his election shall not stand, and it was not necessary to examine the motive or purpose which he had in view in resorting to such practices.

"Once it is recognized that certain limitations have to be implied in sub-clause (b), there naturally arises the question as to how that sub-clause is to be inter-related to sub-clauses (a) and (d) of the same rule. It is by no means easy to determine the exact scope of these several sub-clauses, and it is evident that to a certain extent they overlap each other. Taking only one illustration, we may point out that under sub-clause (b)

any single act of corrupt practice specified in part I of schedule V will suffice to avoid the election ; but under sub-clause (a) the provision is that an election procured or induced by a corrupt practice or an election, whose result has been materially affected by a corrupt practice, shall be void. It will be noticed that sub-clause (a) is not restricted to corrupt practices under part II of schedule V, and it is difficult to see why, if, as provided in sub-clause (b), a single act of corrupt practice under part I should suffice to avoid the election, the rule should have thought fit to lay down the same result in sub-clause (a) only when the election of the returned candidate has been procured or the result of the election has been materially affected by the corrupt practice. Again, under sub-clause (d), the election of a returned candidate is declared void if the election has not been a free election by reason of the *large number* of cases in which undue influence or bribery within the meaning of either part I or part II has been exercised or committed. But sub-clause (b) does not make the result depend upon the *number* of cases proved. We are therefore led to think that it is not possible to apply sub-clause (b) in all its generality or its literal meaning, but that its application should be determined in accordance with what seems to us to be the spirit underlying the several rules. We are aware that sub-clause (d) may be said to correspond to what in the English law is described as common law invalidation, as distinguished from the statutory invalidation provided for by specific enactments, and, as under the common law rule, this provision is intended to cover cases in which a court may be satisfied that the votes of a number of persons were corrupt or bribed, but it is not possible to trace the offence to the candidate or to one of his agents. It is instructive to note that, even in dealing with this common law rule, it was recognized that it is always subject to the qualification that the corrupt practice had been committed *in favour of the persons who had been elected*. The following passage from the judgment of Denman, J., in the *Ipswich* case (1866, 4 O'M. & H., 71), abstracted at page 93 in Fraser's book on the ' Law of Elections ' aptly expresses the qualification and the reason for it :

' If one saw that bribery was so rife that there could be no further election held in the place, then I should say the election would be avoided, subject only to this, that it would be obviously unfair to avoid the election, if one found that the bribery which had been committed had not been in favour of the persons who had been elected. There must be that qualification always,—for it would be impossible for a person who had been fairly elected to be unseated merely because his opponents had been largely guilty of bribery.'

" Having regard to the way in which the rules have been worded and the difficulties in their interpretation which we have above referred to, we see no reason why in interpreting them we should not be guided by the consideration underlying the above observation of the learned Judge.

“It may be that, if a candidate by himself or by his agents resorted to corrupt practices with a view to help a friend of his, he may thereby incur certain penalties under the criminal law of the country, or he may even run the risk of being disqualified for the future, if he should be found guilty of such offences ; but it would not necessarily follow that the punishment should also include the invalidation of his own election. In this connection, we put to the petitioner’s learned Counsel the illustration of a candidate for one ward in a municipality helping a friend of his by corrupt practices to win a contemporaneous election for another ward. He seemed prepared to concede that the election of the former candidate for his own ward will not be vitiated by the corrupt practices committed by him in the other ward. But he maintained that in the present case where the election has been made according to the principle of proportional representation by means of the single transferable vote, the election of all the candidates must be dealt with *as a whole*, and that we cannot separate the return of the respondent as unaffected by the corrupt practices alleged. If this argument is pursued to its logical limits, the petitioner will be in this difficulty, that he is not now in a position to have the election of the other candidates returned at the same time set aside, either because he is out of time to do so or because he is not able to connect those candidates with the alleged corrupt practices. We do not therefore feel much impressed by the argument based upon the fact that the election of the several candidates should be dealt with as a whole and the case of the respondent should not be separated from that of the others. Looking at the matter from the point of view of the voters’ intention, it will be anomalous if we are to hold that, even on the hypothesis that the respondent has improperly marked preferences in favour of the other candidates, they are nevertheless entitled to retain their seats, but that the respondent himself for whom all the electors intended to give their votes should be unseated. We are not satisfied that such a result was contemplated, or is warranted by the rules. In this view, we have the honour to report that the respondent has been duly elected and we accordingly recommend that the petition may be dismissed.

“As regards costs of the enquiry, we recommend that a sum of Rs. 1,000 be paid by the petitioner to the respondent.”

CASE No. LXIII

**Madras Indian Christians (South-West Districts)
1921**

(MADRAS LEGISLATIVE COUNCIL.)

JOHN P. SIQUEIRA AND OTHERS *Petitioners,*

versus

RAI SAHIB E. C. M. MASCARENHAS *Respondent.*

Petition dismissed for non-appearance of petitioners in part-heard case.

CHARGES of undue influence were made in the petition against the respondent by misrepresentations and threats. It was alleged that the voters were induced to record their votes in favour of the respondent by misrepresentations and threats. It was also alleged in the petition that Dr. Fernandes, the vice-chairman of the Mangalore municipality and the chief medical authority of Father Muller's hospital, espoused the cause of the respondent, and by taking improper advantage of his being the chief medical officer of the said hospital put undue pressure on the electors to record their votes for the respondent, and employed several of the staff of the hospital to similarly influence the electors to vote for Mr. Mascarenhas.

It was also alleged in the petition that the electors were misled by false and malicious statements contained in the publications printed and published with the connivance of the respondent.

Charges of bribery were made against the respondent and his agents. The latter were also charged with having committed other infringements of the rules and the petitioners prayed that, in the circumstances, the election of Mr. Mascarenhas might be set aside.

On the 14th April, 1921 the Commissioners sat at Madras and passed an order directing the petitioners to file full particulars in regard to the various charges made in the petition, and by the same order the trial was fixed to take place on 2nd May, 1921 and on the suggestion of the petitioners and the respondent, the Commissioners directed the enquiry to be held at Ootacamund, as it was stated that the witnesses would find it convenient to be examined there.

The petitioners filed particulars in accordance with the order, and specified, *inter alia*, various alleged instances of bribery and undue influence.

On behalf of the petitioners, Mr. A. J. Lobo was examined at some length. We may point out that Mr. Lobo stated in his examination-in-chief that he could not speak to any of the matters or incidents alleged in the petition of his own personal knowledge, and that he was accordingly not able to substantiate any of the charges made in the petition.

After Mr. Lobo's examination-in-chief was finished, Mr. Varada Rao represented to us that a large body of the Roman Catholic community was anxious to withdraw the petition with a view to avoid further bitterness being engendered and applied for an adjournment, stating that with the consent of the petitioners who were then not represented before us he would make an application for the withdrawal of the petition. He also represented to us that if it should become necessary to proceed with the petition the enquiry might be held at Madras. Mr. Varada Rao stated that he had no other witnesses whom he could then examine at Ootacamund.

We adjourned the enquiry to the 9th May, 1921 and fixed Madras as the place where further enquiry would be held.

On the 9th May the petition was taken up at Madras and Mr. Varada Rao stated that he was not in a position to proceed with the petition. Mr. A. J. Lobo did not appear for being cross-examined. The petitioners for whom Mr. Varada Rao did not appear were called in court and were absent. We thereupon dismissed the petition and directed the petitioners to pay the costs of the respondent, to be taxed by the Registrar of the Election Court on the scale obtaining on the Original Side of the High Court of Judicature at Madras. The Advocate-General applied for his costs and as in our opinion there was no reason to direct any of the parties to pay his costs, we disallowed his application.

Having concluded the enquiry, we report to His Excellency the Governor of Madras that Rai Sahib, E. C. M. Mascarenhas, the candidate returned for the Indian Christian constituency of the south-western group of districts of the Madras Presidency to the Madras Legislative Council, has been duly elected and that no corrupt practice has been proved to have been committed by the candidate returned, or any of his agent or any other person whatsoever.

CASE No. LXIV
Madras North (M.) 1935
(INDIAN LEGISLATIVE ASSEMBLY.)

ABDUL LATIF SAHIB FAROOKHI *Petitioner,*

versus

UMRALISHA *Respondent.*

Irregularity in despatch of polling boxes or mistakes of voters in placing ballot-papers in wrong box did not affect the result of the election.

An election petition should not be presented before the returned candidate has made a return of his election expenses.

THERE were four candidates for election in 1934, for the North Madras Muhammadan constituency. The constituency contains twelve districts, and there are 587 polling stations in it. With two of the candidates we are not concerned. They polled comparatively few votes and are not parties to this petition. But there was a very close contest between the first two candidates. Mr. Umralisha (the respondent) was declared duly elected by the Collector of Guntur, who was returning officer for this constituency. He received 630 votes as against 625 cast for Mr. Abdul Latif Sahib Farookhi, the petitioner.

The election took place on November 10th, 1934 and the ballot-papers were counted on November 21st. There were 70 ballot-papers which were declared invalid by the returning officer as against 1,842 valid ballot-papers. The 70 invalid votes were made up as follows :—

- (a) twelve were rejected because the polling officer had not initialled them ;
- (b) fourteen were rejected for other reasons ;
- (c) forty-four were rejected because they were Hindu ballot-papers and related to a non-Muhammadan constituency.

More must be said about these 44 non-Muhammadan votes. The election for the non-Muhammadan constituencies took place on the same day (November 10th) and the same polling stations were used. The returning officer for one of the non-Muhammadan constituencies was the Collector of Cuddapah, while as stated above the Collector of Guntur was the returning officer for the North Madras Muhammadan constituency. A mistake occurred in connection with the ballot-boxes from Lepakshi polling station, which is in the Anantapur district. The box containing non-Muhammadan votes (37 in number) was by mistake sent to the Collector of Guntur, while that containing the Muhammadan votes (there was only one vote in it) was sent to the Collector of Cuddapah.

The Collector of Guntur failed to notice that the wrong ballot-box had been sent to him. He opened the box which he received from Lepakshi on November 21st and found 37 ballot-papers therein. Having made a note of this fact, he added these ballot-papers without examining them to the ballot-papers taken from other boxes.

The Collector of Cuddapah, however, did notice that the box received by him from Lepakshi was intended for the Collector of Guntur. He sent it to the Collector of Guntur with a covering letter (exhibit A), which, however, was not seen by the latter officer until the following morning, when the counting of votes was over and the result had been declared.

The 37 non-Muhammadan votes in the Lepakshi ballot-box opened by the Collector of Guntur were rejected as invalid. They were, however,

subsequently picked out and sent back to the Collector of Cuddapah. The ballot-box from Lepakshi relating to the North Madras (Muhammadan) constituency forwarded by the Collector of Cuddapah was after notice to the candidates opened by the Collector of Guntur. The respondent (Mr. Umralisha) who had already been declared elected objected to its being opened and the votes therein counted, but the petitioner who had been unsuccessful in the election did not object to that course. On being opened, the box was found to contain one vote only, cast neither for the petitioner nor for the respondent.

This mistake therefore did not in the least affect the result of the election. Nevertheless this mistake coupled with the closeness of the voting induced the petitioner to file this election petition. The petitioner attributes the mistake to errors in procedure committed by the returning officer (Collector of Guntur) and suggests that his erroneous procedure may have led to similar mistakes which were not detected. In particular, the suggestion as developed is that the seven other non-Muhammadan votes rejected by the Collector of Guntur may have come to him in ballot-boxes which ought to have gone to the Collector of Cuddapah, and some Muhammadan ballot-boxes may have been received and opened by the Collector of Cuddapah and the ballot-papers rejected by him on the score that they did not relate to his constituency. This suggestion has been met by Mr. Strathie, the Collector of Guntur, who was examined as a witness by the petitioner. All these seven non-Muhammadan ballot-papers found among the Muhammadan ballot-papers can be accounted for. One came from Razole in East Godavari, one from Bezwada, two from Bellary municipality, one from Ponnammunda in East Godavari and two from Timmacherla in Anantapur. In the case of five of them the polling officer has actually made a note on form VI that a non-Muhammadan voter had put his paper in the wrong box. That was the voter's mistake.

To sum up. The 44 rejected non-Muhammadan votes have all been duly accounted for. Thirty-seven of them were received in a box from Lepakshi which was mis-sent to the Collector of Guntur and 7 found their way into Muhammadan ballot-boxes in various polling stations owing to mistakes committed by the voters themselves. There is therefore absolutely no foundation for the petitioner's suggestion that in addition to the Lepakshi boxes other ballot-boxes went to the wrong destination and the mistakes were not discovered.

A word must be said about the petitioner's allegation that a wrong procedure was followed. He is under the impression that ballot-boxes should not be opened and ballot-papers should not be counted until form VI has been received from every polling station. That is his interpretation of regulation 48. But we consider that the main object of this regulation is to ensure that all ballot-papers entrusted to polling

officers are duly accounted for by them. The regulation, in other words, is intended as a check on polling officers and not primarily as a check on the returning officer or on his counting of votes.

We desire to draw attention to the fact that this petition was filed in haste and prematurely. It was presented before the returned candidate had made a return of his election expenses,—which is contrary to rule 32 of the Legislative Assembly electoral rules—*vide* paragraph 21 of the petition.

The grounds on which an election may be declared void are given in rule 44 of the electoral rules. But in this petition there is no allegation of any corrupt practice, and no suggestion of undue influence or bribery. The petition can only be deemed to be based on an allegation that the election has been materially affected by non-compliance with the electoral rules and regulations. We are unable to find that there has been in fact any such non-compliance with the electoral rules and regulations, and we are satisfied further that the election has not been materially affected by the counting of votes before form VI had been received from all polling stations by the returning officer.

We find that Mr. Umralisha, the returned candidate and the respondent before us, has been duly elected. We recommend that the costs of the respondent be borne by the petitioner and we assess the costs at Rs. 500.

CASE No. LXV

**Madura and Trichinopali *cum* Srirangam
(M.U.) 1924**

(MADRAS LEGISLATIVE COUNCIL.)

V. S. MUHAMMAD IBRAHIM *Petitioner,*

versus

1. ABBAS ALI KHAN SAHIB }
2. A. P. SAYID IBRAHIM } *Respondents.*

Recount allowed. Counterfoils should not be attached to the ballot-papers as leading to the identification of the voter and impairing the secrecy of the ballot. Ballot-papers bearing the thumb-impressions of voters should be rejected.

A general scrutiny to discover personation will only be granted when name of the person alleged to have voted twice is given.

Irregularities in procedure by the returning officer pointed out.

THE chief grounds in this petition for setting aside the election of the first respondent are irregularities in the taking of votes at the polling stations, and irregularities in counting them afterwards. We shall deal in turn with these grounds on which the petitioner relies before us.

2. The election return showed 492 votes for the first respondent and 480 for the petitioner. We held a general recount which showed 493 for the first respondent and 480 for the petitioner. There are two votes admitted to have been cast in the names of persons who are really dead, corresponding to voters nos. 185 and 189. One of these so cast was for the petitioner and one for the first respondent. These must be struck out. This leaves 492 votes for the first respondent and 479 for the petitioner.

3. The first objection taken by the petitioner is that several votes were disallowed to him because the counterfoils of the ballot-papers were not detached from them. The returning officer does not seem to have proceeded on any principle in this matter. We find some ballot-papers with counterfoils attached, counted as valid and others rejected as invalid. The reason for the rejection was, we presume, that the voter could be identified from the counterfoil attached to his ballot-paper since regulation 47 of the Madras electoral regulations says that the ballot-paper shall be rejected if it bears any mark by which the elector can be identified. What the ballot-paper is, is not as clearly set out in these rules as it might be; for example in regulation 21(1) it is laid down that the "ballot-paper" shall be in form III, which comprises both the counterfoil, while in clause (2) of the same rule, at the beginning "ballot-paper" is used to include counterfoil, while at the end "counterfoil" is distinguished from the "ballot-paper"? But regulation 47 itself makes it quite clear that "ballot-paper" as used in that regulation does not include the counterfoil: because, otherwise, since the counterfoil should, under regulation 22, always contain the name and number of the elector by which he can be identified, the rule would be unintelligible if "ballot-paper" included "counterfoil". What we have to see is whether on the wording of regulation 47 there is on these ballot-papers, that is the outer-foils, any mark by which the elector could be identified? And we find none. We cannot proceed in deciding a matter of this kind on any general theory as to what the regulations are designed to effect in order to ensure the secrecy of the ballot. Government has set down by regulations the limit within which such secrecy is to be preserved and the method by which it is to be preserved. What we have to decide is whether or not these regulations have been broken? We find that in these cases there is no breach of the regulation. *Woodward*

vs. Sarsons,¹ X. Common Pleas, 733, it was held that voting papers put into ballot-boxes wrapped up in declarations of inability to write by which obviously the voters might have been identified, were not invalid. We hold therefore that these votes were perfectly valid. They are ten in number and are all in favour of the petitioner. This brings his figure up to 489

We have admitted for first respondent one certified vote, serial no. 2387, and one other vote, serial no. 1836, included in the rejected bundle for no sufficient reason that we can see. The word "rejected" does not even appear on this latter vote. It may have been rejected because of a wavy scratchy line on it. But the cross is clearly opposite the first respondent's name. This brings the figures to 494 for the first respondent, and 489 for the petitioner.

There were nine tendered votes. Only seven tendered ballot-papers were forthcoming. But all the tendered counterfoils are here. The petitioner claims three of these nine in his favour as being the valid votes given by the real voters. The first respondent claims that two others tendered for the second respondent are the real votes, and that the corresponding accepted votes for the petitioner are not valid. In regard to these tendered votes generally, we hold that when a party claims that a tendered vote should be substituted for an accepted vote it lies heavily on him to prove his contention, and that the evidence must be enough to satisfy the court that a real error has been committed.

As regards tendered votes bearing serial nos. 2550, 2487 and 2500 no evidence has been given to show that the accepted votes were not valid votes. Nos. 2487 and 2500 are the two tendered votes, for which the outer-foils are missing, the accepted votes being for the first respondent and the petitioner, respectively. The petitioner cannot claim that 2487 should be counted for him, since he has claimed only three out of the nine tendered votes, and these three are serial nos. 2546, 2548, and 2549. The accepted votes corresponding to 2550, 2487 and 2500 must therefore stand. On the principle enunciated above, we consider that tendered serial nos. 2246 and 2549, on which the petitioner's witnesses 3, 4, 7 and 8 gave evidence, un rebutted by any evidence on the respondent's side, should be counted for the petitioner. As the accepted votes corresponding to these were cast for the second respondent this involves no deduction from the total vote for the first respondent. As regards 2521, on the other hand we consider on the same principle on the evidence of P.W. 1 that the accepted vote should be struck out. It was cast for petitioner. The evidence as regards the other tendered votes 2501, 2548 and 2547 is not sufficient in our view to justify the invalidation of

¹ See appendix II, page 731.

the votes already accepted. On the whole then the petitioner gets an addition of two tendered votes, less one accepted vote struck out. This brings the figures to 494 for the first respondent and 490 for the petitioner.

The next point is that the thumb-impressions of two illiterate voters who voted for petitioner were taken on their ballot-papers, the outer-foils. These were rejected by the returning officer, and not counted. The evidence of P.Ws. 1 and 2 shows that the taking of the thumb-impressions was most probably at the instance of the polling officers, P.Ws. 1 and 2, who appear to have been not sufficiently acquainted with the regulations. One of them P.W. 2 even went so far as to take a vote outside the polling booth altogether. We cannot say that these impressions are not marks by which the voters can be identified. The ease or difficulty with which such identification may be made is not in our opinion a factor for consideration. Under rule 47 these votes were rightly rejected. If the result of the election were going to be affected by the taking of these thumb-impressions we should have had to set aside the election. But even allowing these votes in favour of the petitioner it would still leave him in a minority of two. The result of the election is therefore not materially affected by such irregularities.

As regards the allegation that certain polling agents may have voted twice, once in their own ward, and once in the ward where their certificates allowed them to vote, we regard the allegation as too vague to justify a general scrutiny in order to see whether there is any substance in the allegation. If the petitioner was relying on any definite information he ought at least to have known and mentioned the name of the agents who so voted twice, and thus laid a definite foundation for a general scrutiny.

The net result is that the election of the first respondent is sustained and the petition is dismissed.

We have carefully considered the question of costs, and we are impressed by the fact that the petitioner has not made any charges which he has failed in a large measure to substantiate, and in view of the proved irregularities in the conduct of the election we are not able to say that it was not in the public interest that this petition should have been advanced and heard. We are also impressed with the exceedingly small difference that there is in the number of valid votes cast for the petitioner and for the first respondent. In these circumstances we consider it proper to direct that each party shall pay his own costs.

In conclusion we must point out that the returning officer has failed in his duty in four points :—

- (1) He has not written the word "rejected" on any of the rejected ballot-papers, as he was bound to do under regulation 46(c).

- (2) He has not forwarded two of the outer-foils of tendered votes, and apparently has lost them.
- (3) He has for no reason rejected some ballot-papers with counter-foils attached, while admitting others also with counterfoils attached.
- (4) The counting of votes was inaccurate, as we have demonstrated by recounting.

It must also be noted that some of the polling officers were not sufficiently instructed in the rules as is evident from their taking of thumb-impressions as noted above, and from the omission in many cases to detach the counterfoils from the ballot-papers.

CASE No. LXVI

Magwe West, 1926

(BURMA LEGISLATIVE COUNCIL.)

MR. CASSIM MAHOMED SURTY *Petitioner,*

versus

U BA U *Respondent.*

Owing to keen interest taken in the election a large number of electors were unable to record their votes.

Held, that the election was not a proper election. The successful candidate was unseated.

At a Burma Legislative Council election held on the 17th of November, 1925 in connection with the Magwe West constituency, the four candidates obtained votes as follows :—

(1) U Ba U (the successful candidate)	..	..	4,614
(2) U Po Yiek	..	..	4,194
(3) Mr. C. M. Surty	..	..	2,824
(4) U Chit	..	..	190

Evidence more formidable in bulk than in reliability has been produced to show that there was organized obstruction on the part of the supporters of U Ba U, the suggestion being that these disturbances were led by persons, who to all intents and purposes were agents of U Ba U and that these disturbances were tacitly acquiesced in by U Ba U himself.

That both at Twingone and Letmagone, there was a steady struggle for position between the Indian voters—who might be reasonably supposed to be mainly supporters of Mr. Surty—and the Burmese voters—who would for the most part vote for U Ba U—is beyond doubt. At both polling stations, the Burmans although in the minority at the commencement succeeded in posting themselves close to the polling booth entrance, and effectively prevented the majority of the Indian voters in the early part of the day from obtaining admission to the polling booth, while violence akin to rioting on the part of the Burmans caused about mid-day voting at Letmagone to cease for a time. In view of the slowness with which voting was proceeding owing to the difficulty of tracing names and taking into consideration the natural vivacity of the Burman character, this behaviour is not conclusive proof of anything beyond communal rivalry—and a desire that the persons nearest the booth should be given preference. There is a suggestion that U Ba U's supporters wearing the green favours which distinguished his agents and leading workers were active in thrusting down from the booth sundry Indian voters, but the evidence of the officers in charge of the police shows that there was great confusion at both places, and it is possible that the action of some of these individuals may have been misinterpreted. It is furthermore highly probable that they did show some preference as between the Burmese and the Indian voters when endeavouring to clear the crowds from the booth. It is significant, however, that no complaint against the agents on the score of overzealousness or partiality was made to either presiding officer, although there were continual complaints that the Burmese voters were jostling the Indian voters. None of the officers whose duty it was to maintain order such as the Assistant Superintendent of Police and the Sub-Divisional Officer appear to have noticed any of the agents taking part in the disturbances. Indeed there is evidence that they endeavoured to pacify the crowds. While, therefore,

we believe that there was an attempt on the part of the Burman supporters of U Ba U to prevent Indians from getting into the polling booths, we do not consider that there is sufficient evidence to prove that the disturbances had the sanction direct or indirect of U Ba U or his recognized agents. No disqualification can, therefore, on this ground attach to U Ba U. The origin of the disturbances would appear to be the inadequacy of the electoral machinery and consequent delay which taxed the patience both of Indian and Burman voters.

Arrangements had originally been made to provide 19 polling booths, but the number was raised to 25 on representations by U Ba U. Mr. Esoof, the election agent for Mr. Surty, who, on the 23rd October, 1925, had written to the Deputy Commissioner that there would probably be language difficulties telegraphed to the Deputy Commissioner on the 4th November that as additional stations had been allotted to the other candidates, his candidate should be allowed three more stations, as he calculated that each polling booth could dispose of only 600 voters in a day. In evidence he explained that he intended these additional booths to be allotted to Indians only. It was unfortunate that time did not permit of the opening of additional booths since the event proved that the number of polling booths provided was utterly inadequate. The responsible authorities appear to have completely underestimated the interest which was being taken in the contest, although the evidence of the candidates themselves and of Captain Hall, Assistant Superintendent of Police, renders it evident that the general public anticipated a keen contest. The authorities were doubtless misled by their experience of the previous election in which out of a total electorate of nearly 60,000, only 2,271 went to the poll throughout the whole constituency.

That Mr. Esoof's estimate of the speed at which voting could be conducted in the areas in which there was active rivalry between the various candidates was not unreasonable is borne out by the figures for stations at which there were no disturbances. At Beme 554 voters out of a total electorate of 2,814 had succeeded in recording their votes before the polling was closed; at the township officer's office at Yenangyaung 538 voted and at Nyaungghla 885 votes were recorded; at Twingone where alternate voting had been introduced early in the day 642 voters voted. We think that it would be unsafe to anticipate an average disposal of over 800 voters a day at any booth, even assuming that the electoral rolls were reasonably accurate. It is true that at Nyaungbinywa 1,700 voted out of a total electorate of 4,185 voters, but it is noticeable that 1,616 of these voted for U Po Yiek. No evidence is before the Commissioners as to how the election at Nyaungbinywa was conducted, but it may be assumed that few, if any, objections were raised. At Magwe 1,038 out of a total of 4,625 voted; here again it may be presumed that there was practically no opposition. It may be noted that a

breakdown at this last station was narrowly avoided since only 1,100 tokens had been provided.

It is indisputable that the candidates expected the main electoral battle to be fought out in the oil-field areas. Both U Ba U and Mr. Surty had been active in their canvass and special facilities had been afforded by the oil companies to enable their employees to go to the poll.

Apart from any evidence therefore it would *prima facie* be a matter for comment that out of 18,325 voters in the oil-field areas of Chauk, Beme, Twingone, Letmagone and Nyaunghla only 3,181 succeeded in voting. These figures are all the more remarkable when it is considered that at the Yenangyaung township officer's booth more than 50 per cent. of the total electorate voted, while Shwekyanggon Zayat polled nearly 60 per cent.

It is established, however, even by the evidence for the respondent, that at Twingone, Letmagone and Beme, several hundred people had not succeeded in voting when the booths closed. The Sub-Divisional Officer, U Chit Khaing, estimated that at the close of the poll at Twingone some 300 people had not voted and considered that at Letmagone the crowd—presumably voters—throughout the day averaged a thousand. Mr. Jellicoe who presided at Beme, stated that in the evening there was still a large number of voters who had not had an opportunity of voting, while his assistant estimated this number at between 200 and 300. It is alleged by petitioner that large numbers of Indian voters disgusted at the delays and the disturbances which were going on both at Twingone and Letmagone returned to the oil-fields without voting. These allegations are confirmed by admissions of witnesses for the respondent that the Indians were in a considerable majority at the beginning of the polling. The returns for Letmagone show that only a hundred and seventy voters voted, the total electorate for Letmagone being 3,633. The evidence both of the Sub-Divisional Officer and the presiding officer at Letmagone shows that all day long disturbances were going on, and that there was inordinate delay owing to the inaccuracy of the electoral rolls and the consequent difficulty of tracing voters. Letmagone, therefore, appears to have been virtually disfranchised since all but a negligible proportion of voters were denied the opportunity of voting. At Twingone, where after trouble had arisen between Indians and Burmans, a system of alternate voting, one Indian and then one Burman, had been adopted, some hundreds of voters must have gone away during the day or been turned away at the close of the voting, since out of a total electorate of 4,597 only 646 succeeded in voting. The presiding officers themselves are of opinion that even had there been no disturbances it would have been impossible to cope in the course of the day with the stream of voters. It may be pointed out, moreover, that the system of alternate voting—although (under the particular circumstances) probably the only

workable system—is by no means ideal since it militates against whatever party happens at any time to be in the majority. This evidently struck the imagination of the Burman voters at Letmagone where the polling booths had to be closed half an hour before the specified time, while an infuriated mob outside howled that they had not been allowed to vote and that there had been unfair discrimination in favour of the Indians. At Bene, the staff was insufficient to enable all voters to record their votes before the close of the poll, while in addition supervision was so inadequate that although the presiding officer's check showed 554 voters as having voted, 624 tokens were found in the ballot-boxes, a discrepancy which suggests that tokens may have been issued in appreciable quantities to unauthorized persons.

Under the circumstances, we are constrained to hold that the Magwe West election was not an election in the proper sense of the word, since a large proportion of the electorate was prevented from exercising its rights of suffrage. We are of opinion, therefore, approving the principles adopted in the *Bulandshahr (East)* case (see page 221) that under section 44(c) of the Burma electoral rules, the election is void, and that under the circumstances Mr. Surty's claim to be declared elected cannot be entertained.

CASE No. LXVII
Mandalay Town, 1933
(BURMA LEGISLATIVE COUNCIL.)

U BA U *and* ABDUL RAZAK *Petitioners,*

versus

U BA SHWE	} <i>Respondents.</i>
U MAUNG MAUNG GYI	..	..	..
U BA THAN	..	..	..

Interference with the voter must be with the connivance of candidate or by an agent in order to avoid the election.

Misrepresentation does not in itself of necessity constitute undue influence.

U BA U and ABDUL RAZAK, unsuccessful candidates for the Mandalay Urban General constituency at the election of members of the Burma Legislative Council held on the 9th November, 1932 at Mandalay, have filed separate petitions praying that the election of the three returned candidates U Ba Shwe, U Maung Maung Gyi and U Ba Than may be declared void on the ground of corrupt practices : and that the petitioners themselves may be declared duly elected.

The allegations in each petition follow similar lines, and the two petitions have by consent been heard together.

The petitions set forth a number of instances of corrupt practices and undue influence in various forms, but no evidence has been forthcoming to substantiate the majority of the specific allegations.

The only direct case of undue influence of which any evidence is available is that of Maung Lwin, liquidation clerk, and his brother Maung Kin who called a meeting in support of the separationist candidates at the Mondaing *zayat* on October 23rd last in consequence of which an anonymous letter was sent threatening to burn down the *zayat* (and according to Maung Lwin, the headman's house) unless an apology was tendered. The letter was unfortunately torn up and though the fragments were pieced together by the police they were not forthcoming. A meeting was held at which Maung Lwin tendered a public apology, which was posted in writing at the *zayat*, and also published in the *Burma Patriot* of October 31st.

Before the meeting the house of Maung Lwin was stoned and he had to take refuge elsewhere. From the evidence of Maung Lwin and the ward headman alone this would appear to have been a glaring case of undue influence, but it is not established that the interference with the rights of Maung Lwin and his brother was by agents of the first three respondents or with their connivance.

The facts would therefore come within the purview of paragraph 1 of part II of schedule IV to the electoral rules and not within part I.

It appears, moreover, from the evidence of the investigating officer Teik-Tin-U that the forefront of the offending of Maung Lwin and Maung Kin, was that they held the meeting without first obtaining permission of the elders of the quarter. The result is to mitigate considerably the seriousness of this instance of undue influence by supporters of the returned candidates.

There was also some evidence to show that cardboard notices were affixed to the houses of anti-separationists to indicate that they had agreed to follow the advice of the clerical party. On the face of it this savours of undue influence, but Maung Kyaw the only witness, who had such a signboard at his house, stated that he worked for the

anti-separationists because he preferred it and made no allegation of undue influence by clerics.

Another witness Maung Pye stated that house-owners dare not remove such notices through fear of the clerical party, but he also deposed that such notices were affixed to the houses of separationists and anti-separationists indiscriminately.

On the evidence it is impossible to hold that the fixing of these placards denoted more than that the persons in whose houses they were posted were followers of the anti-separationist clerical party, or the separationist clerical party as the case may be.

It is common ground that a very large majority of the clerical party, who took an active part in politics, were anti-separationists, and it should be observed that the petitioners are in favour of separation from India, whilst the successful candidates were all anti-separationists.

On behalf of petitioners a large number of leaflets printed and distributed by the anti-separationist party were put in as evidence and great stress has been laid upon these.

It has been argued before us that the publication of the misrepresentations, which these leaflets contain, in itself amounts to undue influence, and that in view of the wide dissemination of this literature the election should be held not to have been a free one. We find ourselves quite unable to accept this contention.

No doubt these leaflets contain a considerable amount of misrepresentation, but misrepresentation does not in itself of necessity constitute undue influence.

The leaflets are intended to give a melancholy picture of the lot of Burma, if separated from India, and suggest amongst other evils that Buddhism will fall on evil days: but it is also true that separationist literature drew a harrowing portrait of the dire state to which Burma would be reduced if it remained an appanage of India, though perhaps there are less misrepresentations in detail in the leaflets filed by respondents.

In the absence of any evidence to show that the literature circulated by supporters of the anti-separationist candidates in any way affected the result of the election we are unable to hold that such literature *per se* has exceeded the legitimate limits of political propaganda to such an extent as to constitute undue influence on any considerable scale. There is no evidence to show that voters assessed the propaganda at other than its due value.

Whilst there is no doubt that the anti-separationist faction of the clerical party used their utmost influence on behalf of the candidates, who were returned, there is no evidence that they induced or attempted to induce voters to believe that they, or any person in whom they were

interested would be rendered an object of Divine displeasure or spiritual censure.

There is some evidence of monks administering oaths and the five precepts to voters before and at the time of the elections, but there is no evidence that the oaths were in any way illegal. To administer the five precepts to a Buddhist is not a matter for adverse criticism, and the only specimen of oath in evidence, exhibit K filed by Razak, is wholly unobjectionable. It transpires from the document in question that the respondents U Maung Maung Gyi, U Ba Shwe and U Ba Than together with another candidate U Tun Min undertook to swear to act unitedly and harmoniously, and, in future, without regard for their lives to act justly for the welfare and advancement of their country and religion.

If the oath alleged to have been administered to voters were of this nature, it certainly cannot be classified as undue influence.

On the issues we find that it has not been proved that the election was not a free one by reason of the large number of cases in which undue influence within the meaning of either part I or part II of schedule IV has been exercised or committed. •

We find that it is not proved that the election of the returned candidates was procured or induced, or the result of the election been materially affected by corrupt practices, and that there is no evidence that any of the corrupt practices specified in part I of schedule IV have been committed.

We find that the election of the returned candidates U Ba Shwe, U Maung Maung Gyi and U Ba Than is not void, and we report accordingly, having regard to the provisions of rule 44, that the returned candidates have been duly elected.

We assess the total costs of the first three respondents at Rs. 850 and we recommend that they be paid by the petitioners in equal shares to the respondents U Ba Shwe, U Maung Maung Gyi and U Ba Than, collectively through their advocate Mr. Johannes.

CASE No. LXVIII

Muzaffarnagar (M.R.) 1924

(UNITED PROVINCES LEGISLATIVE COUNCIL.)

NAWABZADA MUHAMMAD ALJAZ ALI KHAN .. *Petitioner,*

versus

KHAN BAHADUR KUNWAR INAYAT ALI KHAN .. *Respondent.*

Personation proved, both with and without connivance of respondent.

Undue influence by spiritual intimidation proved, without connivance of respondent.

Election declared void.

THE first act alleged by the petitioner is that Mir Khan, son of Allah Bakhsh, deceased, was personated by his brother Chhajju who was not entitled to vote, not being on the electoral roll of Kharar polling circle. In his written statement the respondent denies that any personation was committed, and further denies that he or his agents had anything to do with the identification of voters, and urges that he cannot be held responsible for anything which was not done by or with the connivance of himself or his agents.

It is proved that Mir Khan of Jogia Khera was a voter entered at no. 11 in the electoral roll and that he died on the 22nd of August, 1923, leaving a brother Chhajju who is not recorded as an elector. At the date of the election the name of Mir Khan had not been expunged from the electoral roll, probably because the supplementary roll for the 1923 election was prepared before his death. It is printed in Urdu as Munir Khan but it appears that Munir Khan in the electoral roll is a mistake for Mir Khan. It is to be noted that the letter "n" in Munir has been crossed out in the electoral roll used by the polling officer, and there is no reason for thinking that this was not done at the time of the poll.

According to the patwari of the village the name Chhajju is an *alias* for Munir Khan. At the poll he says he identified not Mir Khan but Munir Khan *alias* Chhajju.

We do not believe the patwari's statement that Munir Khan is an *alias* for Chhajju. If it were so, one would expect this name to appear in the village papers, but admittedly this is not the case. In our opinion the patwari had been tampered with, and we allowed him to be cross-examined by the petitioner as a hostile witness.

The signature slip which is signed by the patwari, clearly gives the name of the voter as Mir Khan and not Munir Khan. If the person who obtained this signature slip and who voted as voter no. 11 was acting in good faith, why did he not vote in the name of Munir Khan, which according to the patwari, was his name and which also appears in the electoral roll? The fact that he proceeded under the name of Mir Khan shows that he intended to personate the deceased voter. If this person was Chhajju, as stated by the patwari, he had no right to vote as he was not entered in the electoral roll. He voted for the respondent who has a share in village Fatehpur which is in the circle of the patwari of Jogia Khera. It was incumbent on the respondent to show that the person who voted possessed a vote. This duty he has not discharged. Chhajju was summoned by the petitioner, but was not examined by either party.

We hold that personation has been proved and that the respondent has failed to rebut the petitioner's evidence on this point. As it is not proved that the respondent or his agent connived at the personation,

we find that this case falls under schedule V, part II, rule 2 of the electoral rules.¹

The second charge of personation is that Nabi Bakhsh, son of Kallu and grandson of Sardara, was personated by some other person at Jansath polling station while the respondent and his polling agent and sub-agent were present.

Nabi Bakhsh, son of Kallu and grandson of Sardara Jhojha, is a substantial cultivator living at mauza Rurkali Talibali. His vote was canvassed by two zemindars of his village, by Muhammad Mujtaba Khan for the petitioner and by Sakhawat Haidar for the respondent, and he promised his vote to the former. His story is that when at about midday he came to Jansath polling station, he was told by the clerk that he had already voted. After three unsuccessful attempts he returned home without recording his vote. It is proved that the respondent himself and the agents of both candidates were present at Jansath polling station. Nabi Bakhsh, son of Kallu, son of Sardara, is the only voter of that name and parentage in this village. His number in the electoral roll is 96. There is a Nabi Bakhsh or Nabia, son of Kallu and grandson of Qadru, living in the village, but he has no vote. The witness Nabi Bakhsh denies that his thumb-impression was taken. It is not clear by whom the signature slip which purports to be that of voter no. 196, was attested; possibly by Hamid, brother of Nawab Jamshed Ali Khan. The finger-print expert has sworn, and it is quite clear to us that the thumb-impression on exhibit 6 is not identical with the thumb-impression of the witness Nabi Bakhsh taken in court. Muhammad Mujtaba, who got Nabi Bakhsh's promise to vote for the petitioner, denies that it is attested by him.

The only point against the evidence for the petitioner on this incident is that no complaint was made to the polling or the presiding officer either by Nabi Bakhsh or by Muhammad Mujtaba Khan, and that no tendered voting paper was demanded. Muhammad Mujtaba Khan says that he complained to the clerks only. It is, however, clear that the witness Nabi Bakhsh was a voter and that some one else voted instead of him. Although the respondent had given an application to the Collector that patwaris should be present to identify his voters, it seems that at Jansath at any rate voters were not identified by patwaris, but by agents of the parties. The real voter no. 196 had been canvassed by both sides, so it is improbable that the respondent's agents would have mistaken another person for him. It is admitted by Sakhawat Haidar that a man of the respondent was identifying voters.

After a careful consideration of the evidence we hold that it is proved that voter no. 196, Nabi Bakhsh, was personated by some person unknown,

¹ Now paragraph 7(2) of part III of the Corrupt Practices and Election Petition Order, 1936.

and that as identifications at Jansath were being made by agents of the respondent Kunwar Inyat Ali Khan, who himself was present, we hold that such personation was committed with the connivance of the respondent or his agent.

The third count is that personation was committed by some person voting as Nabi Bakhsh, son of Hamid of Nagla Buzurg—a name which appears at no. 759 in the electoral roll, though no such person actually exists.

The village-patwari swears that there is no Nabi Bakhsh, son of Hamid, in the village. There are three men of that name in the village, but the fathers of two are named Muhamdi and the father of the third is Khairati.

Muhammad Mujtaba also swears that there is no such person in Nagla Buzurg. On the last hearing of the case the respondent produced a man who gave his name as Nabi Bakhsh, son of Hamid of Nagla Buzurg, who says that he voted at the Council election for the respondent. This witness at first said, what was patently untrue, that his signature slip was attested by Muhammad Murtaza—referring to Muhammad Mujtaba—but afterwards said he did not know who identified him. He said that he saw the respondent inside the polling place. The thumb-impression of this Nabi Bakhsh (exhibit D) was taken in court and has been found by the finger-print expert to tally with the thumb-impression on exhibit 7, which purports to be the signature slip of Nabi Bakhsh, son of Hamid, voter no. 759.

The signature of the attesting witness on this signature slip appears to us to be remarkably like admitted signature of the respondent, and Sher Muhammad Khan, deposed that this signature was the respondent's. Accordingly we examined the Government Examiner of questioned documents, who, after comparison of this signature with several admitted signatures of the respondent, has pronounced it to be that of the respondent. The respondent has examined Mr. Charles Hardless who pronounced the signature on exhibit 7 not to be that of the respondent. Of the evidence of the two experts we consider that of Mr. Brewster to be more reliable and convincing. We are satisfied after full consideration that exhibit 7 does bear the signature of Kunwar Inayat Ali Khan. It was not known that the respondent would be present at Jansath on the polling day, as from his own evidence it appears that he went there unexpectedly. So the theory that a forgery was made beforehand to be used as evidence against him cannot be accepted. Nor would it have been possible for anyone of the petitioner's party to imitate the respondent's signature so cleverly at the time of the identification, which was carried out in the verandah of the polling room in the presence of the respondent's supporters and agents. There is no valid reason why the so-called and self-styled Nabi Bakhsh, son of Hamid, should not have been produced at an earlier

stage of the proceedings. He himself admits that in receipts for rent he is described as Nabi Bakhsh, son of Muhamdi, but says that though his father's real name is Hamid, he is also called Muhamdi. This witness did not come well out of his cross-examination. We think it unlikely that his father's name is really Hamid, and we cannot place any reliance on his uncorroborated evidence, more especially as the petitioner had no opportunity of contradicting it.

The respondent denies that exhibit 7 bears his signature, and also denies that he went into the verandah of the polling station; but on this point he is contradicted by his own witnesses Nawab Jamshed Ali Khan and Sakhawat Haider. If the denial of the signature is false, as we believe it to be, it follows that false personation was committed, and we hold that the respondent was guilty of personation under rule 3, part I, schedule V, while the witness Nabi Bakhsh committed a corrupt practice under part II of that schedule.

We have to deal with two allegations of undue influence.

The first is that at a meeting at Teora on the 30th November, 1923 two Maulvis, Muhammad Faruq and Muhammad Akram, stated that the petitioner had become a Shia and that whoever should vote for him would become a "kafir" and would incur the wrath of God.

We are not satisfied with evidence produced by the petitioner on this point and find that he has failed to prove this charge.

The second instance alleged is that on the polling day Maulvi Muhammad Faruq arrived on horseback at the polling station at Jansath heading a procession which included a flag-bearer and announced to the assembled voters that anyone who voted for the petitioner would become a "kafir".

This Muhammad Faruq appears to be a "stormy petrel" who interests himself in Shia-Sunni disputes. It is in evidence that he has considerable influence among Jhojhas, a class to which many of the voters at Jansath belonged. A telegram was sent to the District Magistrate by the petitioner's polling agent Hasan Ali Khan with the message "Maulvi Faruq ready to fight, great danger". Probably this message gave an exaggerated account of the situation with a view to bringing some officer to the spot. In fact the District Magistrate, Mr. Darling, did arrive at Jansath later in the day and was told by Hasan Ali Khan that Muhammad Faruq had come to Jansath on horseback with several followers and had created some excitement. Mr. Darling has deposed that he was satisfied that no disturbance of the peace had been created, but thinks that Hasan Ali Khan told him that Muhammad Faruq had announced that anyone who voted for petitioner would be considered a "kafir". It is clear from the evidence of the civil surgeon, and the tahsildar, presiding and polling officers respectively at Jansath, that a

complaint was made by Hasan Ali Khan that Muhammad Faruq was creating a disturbance. The cautious attitude of Jamshed Ali Khan, a witness for the respondent on the subject also lends support to the petitioner's allegation on this point.

We think it is proved that Muhammad Faruq did address voters at Jansath polling station in terms that were likely to make ignorant and superstitious person believe that they would be objects of divine displeasure if they voted for the petitioner.

Action of this kind undoubtedly falls within the category of undue influence. The evidence before us does not, however, show that Muhammad Faruq acted with the connivance of the respondent. We therefore find that the action of Muhammad Faruq falls under section 1, part II of schedule V of the electoral rules.

Since we find that the respondent, both himself and through his agents, has been guilty of the corrupt practices noted above, we would recommend to His Excellency the Governor that the election of Kunwar Inayat Ali Khan be declared void.

The petitioner's costs, which we assess at Rs. 2,000 should be paid by the respondent.

Under the provisions of rule 47 we called upon Chhajju, Nabi Bakhsh, son of Hamid, Rahmat Ilahi and Muhammad Faruq to show cause why their names should not be recorded in our report as having committed corrupt practices mentioned therein. It appears from the report of the District Magistrate of Muzaffarnagar that Muhammad Faruq has left India. The other three have appeared and filed written replies to the notices served on them. We have also heard Counsel on their behalf. We are not satisfied with their explanations and see no reason to alter our opinion that they committed the corrupt practices for which they are named in our report.

CASE No. LXIX

Muzaffarnagar (M.R.) 1927

(UNITED PROVINCES LEGISLATIVE COUNCIL.)

NAWABZADA MUHAMMAD AIJAZ ALI KHAN .. *Petitioner,*

versus

NAWABZADA MUHAMMAD LIAQUT ALI KHAN .. *Respondent.*

Bribery alleged, but not proved. It was noticed that no complaint had been made to the presiding officer.

Treating by respondent's agents on a small scale, insufficient to affect "the general freedom of the election" proved.

An "over-zealous supporter" of the respondent was held to have exercised undue influence by threats.

Provision of rule 44(2) (now paragraph 7(2) of part III of Corrupt Practices Order, 1936) held to apply, and election was upheld.

THIS petition arose from the general election held in October, 1926. It alleged many corrupt practices in the form of bribery, direct and indirect, undue influence and personation.

Bribery was said to have taken place at three polling stations, Charthawal, Barla and Titawi. At the first place the Commissioners were of opinion that "the story of cash payments on the large scale and in the open manner suggested by the witness Ismail is improbable; the police officer on duty saw nothing of it. It may be mentioned also that Chhajju who was the petitioner's agent at the Charthawal polling station, says he complained to the presiding officer about the respondent's voters being treated by Karam Karim; he does not say he complained of cash payments being made.

"On the whole we do not find it established that cash bribes were given at Charthawal".

At Barla the evidence tendered was to the effect that those persons who voted for the respondent were paid a rupee each. It was found on a scrutiny of the votes that 298 votes were cast for the petitioner and 69 for the respondent, whereas one witness had alleged that some 200 or 250 voters were paid money on behalf of the respondent. Evidence was given by one Shabbir Hasan that he was working for the respondent at this polling station, and that those who voted for the respondent were paid a rupee each.

It was denied by the respondent in the written statement that Shabbir Hasan did, in fact, work as his polling agent that day. It was suggested that he had been influenced by the fact that there was a profits suit against him which was being tried by the petitioner. The respondent had put in a copy of the order sheet in that case, and the complete record had also been sent for. It appears that on December 17th, 1926, one S. Hamid Husain and one Musammat Fatima instituted a suit for profits against Shabbir Hasan, and the suit was sent to the petitioner, who is an Honorary Assistant Collector, on April 8th, 1927. Shabbir Hasan professed not to know of that suit, but the respondent called Muhammad Ismail to prove that Shabbir Hasan did know of it. Some evidence was produced on behalf of respondent that Shabbir Hasan was working on the election day not for the respondent but for the petitioner. Rastam said that Shabbir Hasan and one Ibrahim wanted him during the hearing of this petition to give evidence for the petitioner to the effect that he had received money, food and conveyance hire, but he refused. Ahmad gave similar evidence and so did Sikandar.

Whatever might be the truth about Shabbir Hasan's activities on the election day and afterwards, the Commissioners thought that the petitioner's evidence as a whole as to bribery at Barla was adequately

met by the respondent. In particular, they found that no complaint was made to the presiding officer, and they did not find that bribery at the Barla polling station was proved.

Only one witness deposed as to bribery at Titawi on the election day itself, but it was alleged that voters were bribed on behalf of respondent on 31st October, 1926. The evidence on this point consisted essentially of a letter purporting to be written by one Phul Khan to the petitioner, telling him that an emissary of the respondent had been to mohalla Chathela and paid voters five rupees a head. Consequently, if the petitioner wanted to secure votes, he would require to pay ten rupees a head.

This "precious communication" was dated October 31st, 1926.

Phul Khan, called as to it, admitted writing it, but said that he was "deceived" into doing so. It was really written, he said, at the petitioner's house one day after the election the date given in it being fictitious.

Muhammad Ibrahim (petitioner's witness no. 3) until lately a pleader's clerk, said the letter was written by Phul Khan at his (witness's) employer's office, and he gave it at Phul Khan's request to the petitioner. The witness was not quite explicit on the point, but apparently he meant it to be understood that the letter was really written on October 31st, 1926. On whatever date it was written, the letter was certainly shown on November 27th, 1926, two days after the election, to Pandit Hari Charan Chaturvedi, Deputy Magistrate. This gentleman was the election officer in the Muzaffarnagar district, and the petitioner showed him the letter on the date above-mentioned. There was a note on it by the election officer to the effect that it was shown to him on November 27th, 1926 at 10 A.M. The object of getting him to make this note was, the witness said, to prevent its being said that it was manufactured after the counting of the votes; when it was brought to him the counting of votes had not begun.

"We do not think it necessary to go into an elaborate consideration of this letter and of the date on which it was to be taken to have been written. If it really was written on October the 1st, 1926, it might have been expected to be produced, if at all, before the election, although its contents were of so corrupt a nature that it is surprising it was produced at all. All that really needs to be said is this. The fact of a man's informing the petitioner that the respondent had been bribing voters is no sort of proof of such bribery, any more than the rest of the letter proved that the petitioner was doing, or was ready to do the same, only on a more generous scale. Very wisely this letter was not strongly pressed on the petitioner's behalf as evidence of bribery having been committed at Chathela, and it is, of course, no such evidence. The petition in a very extraordinary way represented that this bribery was done through

this very man Phul Khan. This of course was not at all what was suggested by the letter." The Commissioners held that the petition in this respect was most carelessly drafted, and this pre-election bribery at Chathela was certainly not proved.

It was alleged that the respondent had promised Rs. 500 for a school at mohalla Sarwat and that an agent of his at a large gathering asked those present to vote for the respondent because of this promise. The Commissioners found that it was not proved that the respondent made any such promise. They observed: "The petitioner's whole evidence as to the promise of Rs. 500 by the respondent is of the nature of hearsay evidence; his witnesses on that point only profess to have heard of it from the Maulvi, and the Maulvi himself denies that the respondent ever made any such gift or promise, or that any such gift or promise, was announced by him to the meeting."

Another respectable witness, a clerk in the district board office, said that food was provided for the voters at a certain house on behalf of the respondent and he saw actual feeding going on at the house of one Karam Karim. The respondent produced nine witnesses but the Commissioners thought their evidence "did not rebut the evidence adduced by the petitioner", and held that two agents of the respondent, at the Charthawal polling station provided food for the respondent's voters.

The charge of undue influence chiefly centred round the action of an Honorary Magistrate, Rao Usman Ali Khan, at the Thana Bhawan polling station. The petitioner produced six witnesses who endeavoured to prove that Rao Usman Ali Khan assisted by Abdul Latif Lambaradar threatened voters that if they did not vote for Liaqat Ali Khan, the respondent, "it would be the worse for them". One witness in consequence made an application to the presiding officer. The respondent called three witnesses, one being a police officer who was on duty at the polling station. He admitted that Rao Usman Ali Khan was there that day but he did not see him putting any pressure on the voters. The presiding officer said he saw Rao Usman Ali Khan during the interval but he did not see him exercise any influence or pressure on voters. The finding of the Commissioners was as follows:—

"We are of opinion on the whole that Abdul Latif and Rao Usman Ali Khan did exercise undue influence on the voters at Thana Bahwan. The former was admittedly an agent of the respondent's, but there is nothing to show that the latter was anything more than an over-zealous supporter of the respondent's or, possibly as was suggested in the application an over-zealous opponent of the petitioner. It is not reasonable to suppose that Wajid Husain would have made the above application, had there been no justification for it, and on a consideration of the evidence as a whole we are, as has been said, of opinion that undue

influence was exercised at Thana Bhawan by the above two men. We shall have to return to this subject again later."

Evidence was tendered that one Diwan, Jat, voted in the name of his brother Dasaundi and this was in fact admitted, but on the material point whether the personation was done at the instigation of an agent of the respondent, the Commissioners found the latter was not shown to have been connected in any way with the act, and was not prejudiced by it. Similarly as regards the case of attempted personation, the Commissioners found—

"There seems to be no doubt that some person, not a voter, whose identity has not come out before us, made an attempt to vote at Oon, and there is some evidence that he intended to vote for the respondent, but there is nothing to show that the respondent was in any way connected with the episode, and we do not hold him to be in any way prejudiced by it."

The general result of our findings, therefore, is—

- (i) treating was done in connection with the voting at Charthawal by the respondent's agent, Karam Karim, and his "*pairokar*", Qutb-ud-din ;
- (ii) undue influence was exercised on voters at Thana Bhawan by the respondent's agent, Abdul Latif, and by his supporter, Rao Usman Ali Khan ;
- (iii) an act of personation was committed by one Diwan at the Shahpur polling station, and an attempt at personation was made by some person unknown at the Oon polling station, but no connection between the respondent and those acts has been established.

We do not think the treating and the undue influence we have found proved were on anything but a small scale,—we do not hold that they affected the general freedom of the election. As was mentioned at the outset, the respondent had the substantial majority of 1,984 votes. Although, therefore our finding is that the returned candidate was guilty by agents of corrupt practices falling under part I of schedule V of the rules, we were of opinion that this is a case in which the provisions of rule 44(2) may reasonably be applied. Accordingly we examined the respondent and his election-agent. The latter is one Muhammad Akram Khan, and is not one of the agents we have found to have been concerned in the above corrupt practices.

The respondent has assured us that he knew nothing of the treating at Charthawal, and no treating took place either there or elsewhere with his knowledge or connivance. To the best of his knowledge and belief, his election agent was similarly guiltless.

Nor had the respondent knowledge of any undue influence at Thana Bhawan, or of the personation by Diwan. He also believes his election-agent to have been unconnected with those matters. The respondent printed and issued a pamphlet, of which a copy, exhibit R/9, has been put in before us. This pamphlet contains a translation of the portions of the rules relating to corrupt practices, and also contains the respondent's own instructions to his polling agents. Copies of these were distributed before the election to the polling agents, and receipts were obtained for them.

Muhammad Akram Khan, the respondent's election-agent, has also sworn that he was in no way connected with, or cognisant of, the corrupt practices, in question.

We are satisfied that the corrupt practices were not committed by the respondent or his election-agent, and that they were committed contrary to their orders, and without their sanction and connivance. We also hold that all reasonable means were taken for the prevention of the commission of corrupt practices, that those practices were of a trivial, unimportant and limited character, and that in all other respects the election was free from any corrupt practice on the part of the respondent or his agents. We accordingly hold, according to the principles laid down in rule 44(2), that the respondent's election is not void, but that he has been duly elected.

CASE No. LXX

Patna West (N.-M.R.) 1927

(BIHAR AND ORISSA LEGISLATIVE COUNCIL.)

BABU DASU SINHA *Petitioner,*

versus

1. BABU RAJANDHARI SINHA } *Respondents.*
2. BABU PUNDEO PRASHAD SHARMA }

There was considerable confusion and rush of voters at certain polling stations. The presiding officer had to close the poll for an hour and a half and resume voting for a similar period on the following day.

Held that there was no breach of the regulations.

It is for the petitioner to prove, not only that an irregularity has taken place, but that the result of the election had actually been materially affected thereby.

An Election Court cannot discuss whether any rule or regulation made is proper or not.

THE election was sought to be declared void on the ground that the voting in two of the polling stations in the constituency, namely, at Islampore and Masaurhi, was conducted in an illegal manner, and was vitiated by non-observance of the provisions of law, and by threats, undue influence and duress which prevented a free exercise of the right to vote on the part of a large number of voters and that the result of the election had been materially affected thereby.

The conduct of the proceedings at Islampore was attacked on the ground that the presiding officer did not adjourn the polling in spite of outbreaks of rowdyism and violence, and serious disturbance between 11 A.M. and 4-35 P.M., which interrupted the work of voting repeatedly, and also that the poll was finally closed at 4-30 P.M., i.e. 25 minutes before the time prescribed by the Local Government.

As regards Masaurhi it is alleged that on the 30th November, 1926, the date fixed for the election, there was rioting and disorder of such a serious nature that the presiding officer, Babu Nandlal Bhagat, was compelled to close the poll at 12 noon. The petitioner's complaint is that no announcement was made then as to when the polling would be resumed, but it was illegally resumed at 2 P.M. that day. The petitioner further complains that on the next day the polling was resumed only for 1½ hours from 10 to 11-30 A.M., whereas it should have continued for a longer period. A large number of voters who came after 11-30 A.M., on the 1st December, were not allowed to vote.

Apart from these specific allegations, the following general grounds have been set forth :—

- (1) The voters of Islampore and of Masaurhi polling stations who numbered more than 1,800 and 1,600 respectively, were not given reasonable facilities to record their votes in accordance with the provisions of rule 15 (1) (3) of the Bihar and Orissa electoral rules inasmuch as it was impossible for such a large number of electors to get their votes recorded at one polling station within a period of seven hours only.
- (2) The respondent had issued printed notices containing false allegations, in order to induce the voters of the constituency to vote for respondent no. 1 and not to vote for respondent no. 2, and that the names of the printer and publisher did not appear on the face thereof.

Respondent no. 1 has filed a written statement in which the allegations of the petitioner are denied, except that it is admitted that there was some confusion at Masaurhi on the 30th of November with the result that the polling was suspended at 1-30 P.M., and resumed at 3 P.M. when order was restored.

Before dealing with the specific allegations in this case we think it will be well to discuss the general law on the subject.

In accordance with the law of this country as laid down in rule 44 of the Bihar and Orissa electoral rules, the election of the returned candidate shall be void if in the opinion of the Commissioners the result of the election has been materially affected by a corrupt practice or by any non-compliance with the provisions of the Indian Election Offences and Inquiries Act or the rules and regulations made thereunder. Thus in the present case we have to decide whether any corrupt practice has been committed, and whether there has been any non-compliance with the rules and, if so, whether these defects have materially affected the result of the election, or in other words whether, had these defects not occurred, the returned candidate would not have secured a majority of votes.

In this respect the law in India seems to be different from the English law. Under section 13 of the Ballot Act (35 and 36 Victoria, C. 33) no election shall be declared invalid by reason of non-compliance with the rules contained in the first schedule of the Act or any mistake in the use of the forms of the second schedule of the Act, if it appears to the tribunal having cognizance of the question, that the election was conducted in accordance with the principles laid down by the Act, and that such non-compliance or mistake did not affect the result of the election. Thus in accordance with the English law if it has been proved that there was a non-compliance with the rules under the Act, the onus lies on the respondent of showing that this non-compliance did not affect the result of the election. Whereas under rule 44 of the Bihar and Orissa electoral rules even though the petitioner succeeds in proving that there was a corrupt practice other than those mentioned in part 1, schedule 5 or that there was non-compliance with the provisions of the law under the Act, the onus still remains on him of showing that this corrupt practice or non-compliance materially affected the result of the election or in other words, caused the returned candidate to obtain a majority of votes. In this connection we may point out that it has been held by Mr. Justice Grove in an English case (the *Hackney* case) reported in volume II of O'Malley and Hardcastle, page 77, that the result of the election must be held to have been materially affected even if, but for the irregularities in connection with the election, the returned candidate would still have been elected though with a reduced majority. However, this view has been dissented from in a subsequent case (the *East Clare* case) reported in volume IV of O'Malley and Hardcastle, page 162, in which it has been held that the result of the election cannot be said to be materially affected unless the irregularities which have occurred actually turned the scale in favour of the returned candidate. It is not sufficient to show that they have merely increased his majority. In our

opinion there can be no doubt that the latter judgment represents the correct view of the law.

Thus in the present case the petitioner must not only show that corrupt practices of irregularities have taken place but he must further show that, but for these corrupt practices or irregularities, the returned candidate would not have obtained a majority of the votes. In this connection we may refer to an Indian case (the *Bulandshahr* case, see page 221), in which it was held, we think rightly, that it was not sufficient for the petitioner to show that the result of the election might have been affected by the non-compliance with the rules, but he must show that it was actually affected thereby.

The difference between the English and the Indian law on the subject is well brought out in the *Lahore* case (see page 474), where it is observed—“The former only requires the creation of a presumption that the result may have been affected; the latter requires the creation of a presumption that it *has* been affected”. As stated in Hammond’s “Indian Candidate and Returning Officer” at page 177 “the petitioner must establish as a fact that the result was (not might have been) materially affected; and he must be able to prove either that the respondent gained or the petitioner lost a *definite* number of votes”.

Evidence has been given to the effect that at Islampore there were lathials inside the enclosure and even in the verandah where the polling was going on. This is improbable on the face of it. It is unlikely that the presiding officer, Dr. R. C. Ray, would have allowed this especially as the polling station was situated at the police thana, and Dr. Ray had the services of the jamadar, constables, daffadars and chaukidars at his disposal. Some of the intending voters are said to have been hurt by these lathials, to the petitioner’s knowledge, but it is significant that he did not complain of this to the presiding officer or to the police officers. There was a complaint in writing, made originally to the presiding officer and then to the police about the holding up of voters in a garden close by. However this petition contains no mention of rowdiness and violence by lathials, or other acts of intimidation. Ramlakhan, who was one of the voters for the petitioner says that he did not see anybody being beaten by lathials. In our opinion, had there been a number of lathials there on behalf of respondent no. 1, and had they been obstructing Babu Dasu Sinha’s voters in the way alleged, the result would have been a free fight in which many people would have been injured. Moreover the petitioner’s allegation on this point are contradicted by the evidence of the presiding officer and of Mr. Fakhr-ud-din who was respondent no. 1’s agent at Islampore. Thus we are unable to hold that there was any systematic disorder or violence caused at Islampore at the instance, or with the connivance, of the respondent no. 1 or that any intimidation took place there.

We are unable to hold that the confusion was due to any deliberate act on the part of the respondent no. 1 or his men. The Sub-Assistant Surgeon states on oath that he did not exercise any undue influence or canvass for the respondent no. 1. It is a fact that he was directed to sit quite near the presiding officer, but this does not necessarily show that he had been guilty of any unfair tactics. This will be clear from the presiding officer's note. We do not think that it has been proved that the doctor acted in the way alleged. In any case there is no proof that he did so, with the connivance of the respondent no. 1.

There is no satisfactory evidence to show that the police officers of Masaurhi were obstructing the petitioner's voters, nor do we think that the allegations against Babu Lal Sao and others have been substantiated.

It is true that there was some crush and confusion at both the stations owing to which the enclosure broke down at Islampore at about 3 or 4 P.M. and at Masaurhi at 1-30 P.M. However this appears to have been due to the anxiety on the part of the voters to vote. As will appear from the evidence the gate of the enclosure at Islampore broke owing to the rush of the voters on both sides and the petitioner's voters were in front. Thus it would seem that they were chiefly responsible for this. Also it would seem that at Islampore there were about 1,000 non-voters present who caused disturbance. Be that as it may, the respondent no. 1 or his agents have not been shown to have been responsible for the confusion or the breaking of the enclosures.

In our opinion it is extremely unlikely that in spite of definite instructions that the polling should continue till 5 P.M., a responsible presiding officer in the position of Dr. Ray would have definitely closed the poll before the appointed hour. The petition (exhibit 8) said to have been filed by Babu Dasu Sinha at 4-35 P.M. does not state clearly that the poll was closed at that time. The presiding officer is positive that this petition was presented to him after 5 o'clock. He swears that the polling went on till 5 P.M. He is corroborated by the sworn testimony of one of the polling officers and of Mr. Fakhr-ud-din and by the probabilities of the case. We find this issue against the petitioner.

In one publication the name of the press is mentioned on the notice. As held in the *Saran* case, the name of the press may be taken as the trade mark of the printer, and the printer of a pamphlet is assumed to be the publisher also. In any case, we cannot find that the omission of the name of the printer or publisher on any leaflet has affected the result of the election within the meaning of rule 44(1) of the electoral rules. It has not been shown that there is any false allegation therein.

We must now consider whether the action of the presiding officer in suspending the poll from 1-30 to 3 P.M. on the 30th November and in resuming it for an hour and a half from 10 to 11-30 A.M. on the 1st of December was a breach of the rules and regulations under the Act, and

if so, whether the result of the election has been materially affected thereby.

In this connection it is necessary to refer to regulation 30 of the Bihar and Orissa electoral regulations. Under regulation 30, clause (1), the presiding officer is bound to keep order at the polling station and to see that the election is fairly conducted. Under clause (2) the presiding officer shall close the polling station at the hour appointed in that behalf by the Local Government under regulation 28 (which in this case was 5 P.M.). However, there is a proviso to the effect that if the presiding officer, owing to the occurrence within the polling station of rioting or disorder beyond his control is compelled to close the poll before the hour so appointed by Government the poll shall be adjourned to the following day to an hour to be fixed by the presiding officer, and shall remain open on that day for a period equal to the period during which the recording of votes was prevented on the previous day.

According to the petitioner, this proviso means that if as the result of rioting and disorder the polling has to be stopped, even for five minutes, the presiding officer has no power to resume the polling on that day for the remaining period after order is restored, but must at once adjourn it to the next day for the remaining period. Thus in the present case, inasmuch as it was admitted that the polling was stopped at 1-30 P.M., it was urged that it should have been then and there adjourned to the next day and should have been opened next day for a period of at least 3½ hours.

It is part of the ordinary duty of the presiding officer to keep order. If a disturbance occurs, he is, as we read the law, bound to make reasonable endeavours to restore order. If he succeeds in restoring order he should resume the polling and continue it till the appointed hour. In case he fails to restore order, he must adjourn the poll till the next day. The expression "rioting or disorder beyond his control" and the wording "compelled" show that he must make reasonable efforts to control the rioting or disorder.

It seems to us absurd to suppose that, on account of a temporary disturbance which may last only for 5 minutes, the presiding officer is bound to adjourn the polling until next day. This view is open to serious objection.

It may be said that the regulation in question is not very clearly worded. But the words of a statute, when there is a doubt about their meaning are to be understood in the sense in which they best harmonize with the subject of the enactment and the object which the legislature has in view . . . (Maxwell on the Interpretation of Statutes, 5th edition, page 85, quoted with approval in *Rawalpindi and Lahore* case, see page 613). It cannot have been the intention of the framers of the regulation that a temporary suspension of polling even for five minutes would require

the presiding officer to adjourn the poll to the next day, and thereby run the risk of there being no voting in case of disorder beyond his control, occurring on the following day.

In our opinion the word "close" in the proviso includes the case of a temporary closure, that is to say, if the presiding officer is compelled to close the poll either temporarily or finally before the hour appointed by Government, the poll shall be taken up on the next day, for the corresponding period during which it remained closed. The words "shall be adjourned to the following day" are specifically inserted in order to guard against the possibility of the presiding officer resuming the poll that very day beyond the hour appointed by the Local Government. The last lines of the regulation in which it is said that the poll shall remain open on the next day for the period equal to that during which the recording of the votes was *prevented* on the previous day, can refer only to the period for which polling was actually prevented by rioting or disorder beyond the control of the presiding officer, and seem to contemplate the re-opening of the polling on the original day after order is restored.

At best it may be supposed that the case of temporary suspension is not provided for in the rules. It is settled law that in cases where no specific rule exists the court must act according to equity, justice and good conscience and in the exercise of its power, it must be careful to see that its decision is based on sound general principles and is not in conflict with the intentions of the legislature. Applying this test to the case in point we are bound to hold that the action of the presiding officer in resuming the poll after restoration of peace and reopening it on the following day for a period equal to that during which it had been suspended on the original day, was in consonance with the dictates of justice, equity and good conscience.

Thus in our opinion the presiding officer was not in any view guilty of any breach of the regulations under the Act.

It appears that the number of the electors in the two polling stations, Masaurhi, and Islampur, is 1,642 and 1,831 respectively, making a total of 3,473, and that according to the evidence of the presiding officers of these two stations, all the voters, if they had come to the polling stations, could not possibly have exercised their franchise and only about 57 per cent. of them could have voted.

It is therefore urged on behalf of the petitioner that the arrangements for voting were insufficient, and hence the election should be set aside. Now clause (c) of sub-rule (1) of rule 44 of the electoral rules authorizes the Commissioners to avoid an election if the result has been materially affected by any non-compliance with the provisions of the Act or the rules or regulations made thereunder, or by any mistake in the use of any form annexed thereto.

It seems to us that the Commissioners are not in a position to question whether any rule or regulation made is proper or not. The Local Government in accordance with the powers vested in it under the rules, has framed regulations for appointing the hours of polling and delegating certain powers to the returning officer. The Election Court is not competent to sit in judgment over those rules or regulations, but it can certainly enquire whether any such rules and regulations have been complied with or not. For example, if the hours fixed be not published by the Local Government in the gazette or if the returning officer does not select a polling station or any particular area or does not appoint a presiding officer and polling officers for each station, these will amount to a non-compliance with the rules and regulations and will come within the province of the Election Court.

Three grounds have been taken in argument for assailing the sufficiency of the arrangements, namely: (1) there should have been more than one polling station for each of these two areas, (2) the time fixed should have been more than seven hours, and (3) the number of polling officers should have been larger.

Under regulation 28 the Local Government has to fix the hours of polling. There is no dispute that 7 hours (10 A.M. to 5 P.M.) have been fixed, and that this was published in the gazette. We cannot say that there has been a non-compliance with the rules and regulations in this respect. Nor can we say that there has been an improper exercise of discretion in this respect, because it is clear from the evidence that the voting in the first hour was slack and voters came in larger numbers after 11 A.M. Hence there would have been no object in starting before 10 o'clock and in the month of November, voting cannot be continued conveniently after 5 P.M.

After considering the evidence we do not consider that the petitioner has established this point or has shown that actually 667 more persons came to vote and were prevented from doing so. No doubt the small percentage of voters at these two stations, viz. 31 per cent. at Islampore and 42 per cent. at Masaurhi, at first sight gives rise to a suspicion that some persons may not have been able to record their votes. However it is a settled principle that suspicion though a ground for scrutiny cannot be made the foundation of a decision. It is essential to take care that the decision of the court rests not upon suspicion, but upon legal grounds established by legal testimony.

There is no satisfactory evidence to show how many voters at Islampore were actually unable to record their votes. The evidence on this point on behalf of the petitioner is somewhat indefinite. The presiding officer has said that as far as he is aware after 5 P.M. only about 5 or 6 voters were near the table round him and were asking for ballot-papers. It is true that there was a large crowd but the evidence shows

that many of the persons present earlier in the day were not voters at all but were mere spectators.

As regards Masaurhi the presiding officer has said that on the 1st December there were many voters present who could not vote. The petitioner's additional polling agent for that station, estimates that out of the persons present there were about 90 or 100 voters with white cards (the petitioner's colour). In this connection we must remember that in paragraph 13 of the election petition the allegation is that the voters who came to the polling station after 11-30 A.M. were not allowed to vote. There is no clear allegation that any who turned up in time were unable to vote.

The paucity of number of voters may be explained by the fact that many did not care to come and vote.

Be that as it may, we are not satisfied that the arrangements as made prevented such a large number of voters from being able to record their votes as would have turned the scale in favour of respondent no. 1.

It appears from the evidence of the presiding officer that at Islampore the polling was interrupted for about 20 minutes on account of confusion at 3 or 4 P.M. No clear ground has been taken by the petitioner that the polling should have been resumed for this period on the following day. However, even if it be taken that this short interruption should have been made good the next day only about 40 more votes could have been recorded in that time. Thus even supposing that all these votes would have been in the petitioner's favour, this would not have turned the scale.

While holding that the election has not been vitiated on this ground, we deem it our duty to recommend that in future elections the returning officer should make suitable arrangement, by opening more polling stations for large areas or by appointing a bigger staff, or in such other manner as may be necessary, in order to enable all the voters to record their votes, if they wish to do so. Arrangements should not be made on the assumption that a large proportion of voters will abstain from voting.

From what has been said above, it follows that the petitioner has failed to establish his case and has not satisfied us that the result of the election has been materially affected by any corrupt practice or by any non-compliance with the rules and regulations made under the Act. Hence in our opinion respondent no. 1, Babu Rajandhari Sinha, has been duly elected.

Before concluding we would like to repeat the weighty observations of Baron Martin in the *Warrington* case reported in O'Malley and Hardeastle's "Election Petitions", volume I, pages 42 and 44 :—

“It would be in my opinion ridiculous to say that because at one booth there was an irregularity the whole of the rest of the borough should be put to the trouble of a new election, and all that has taken place declared null and void. I adhere to what Mr. Justice Willes said at *Lichfield*, that a Judge to upset an election ought to be satisfied beyond all doubt that the election was void, and that the return of a member is a serious matter, and not to be lightly set aside.”

CASE No. LXXI

Presidency Division Landholders, 1923

(BENGAL LEGISLATIVE COUNCIL.)

MAHARAJA SIR MANINDRA CHANDRA NANDY,

K.C.I.E. *Petitioner,*

versus

HON'BLE MR. PRABASH CHANDRA MITTER, C.I.E. *Respondent.*

It is the eligibility of the candidate at time of nomination, an integral part of the election, which it is the duty of the returning officer to examine. The acquisition of new rights cannot remove a pre-existing disqualification.

THIS is an election petition under rule 32 of the Bengal electoral rules and regulations of 1923 presented by Maharaja Sir Manindra Chandra Nandy of Kassimbazar.

The facts as set out in his petition are that he was a member of the Council of State and on 7th October, 1923, resigned his seat on the Council by a telegram and a letter addressed to His Excellency the Viceroy and Governor-General of India.

The telegram was received in Simla at 11-15 A.M. on 7th October, and His Excellency's orders accepting his resignation were passed on the 10th.

The date fixed by Government for the presentation of the nomination papers of candidates for election to the Bengal Legislative Council was 8th October, and on that date the Maharaja delivered three nomination forms to Mr. Lindsay, the Commissioner of the Presidency Division, who was the returning officer for the Presidency Division Landholders' constituency.

On 9th October, the Maharaja sent another telegram to the Viceroy for communication of the acceptance of his resignation to the returning officer.

On 10th October, his resignation was formally accepted by His Excellency and a notification being no. 225 of that date was published in the *Gazette of India* of 13th October.

On 11th October, the date fixed for the scrutiny of the nomination papers by the returning officer, an objection to the Maharaja's nomination was raised on behalf of the respondent Mr. Pravash Chandra Mitter that the Maharaja was not eligible for election on the date of filing the nomination papers, 8th October, 1923, as his resignation had not been accepted by the Governor-General and he was still a member of the Council of State. The returning officer thereupon made the following endorsement upon the nomination paper :—

“ I must refuse the nomination of this candidate, the Maharaja of Kassimbazar. Under section 93 of the Government of India Act the seat in the Council of State becomes vacant on the acceptance of the resignation of the member. The Maharaja wired his resignation on 7th instant and also sent a letter on that day. The only evidence of the acceptance of the resignation is a telegram from Simla, from the secretary, Legislative Department, dated 10th instant. If this evidence is accepted, I must hold that the resignation takes effect from the 10th instant, and that on the 8th instant when the nomination papers were filed, the Maharaja was still a member of the Council of State. Accordingly at the time of his nomination, he was not eligible for election [*cf.* rule 5 (1) (c)]

and so the provisions of rule 11(1) were not complied with. The nomination is therefore refused under regulation XXI (i) and (iii)."

As there was no other candidate, the returning officer proceeded to declare Mr. Mitter duly elected and his name was published in the *Calcutta Gazette* of 28th November, 1923.

The facts as we have summarized them above are not in dispute and we have therefore found it unnecessary to frame any issues.

The main point for our determination is whether the question of the eligibility of the Maharaja for election is to be decided with reference to the date of the presentation of his nomination paper, 8th October, or to the date of scrutiny by the returning officer, 11th October.

Mr. Chaudhuri who has appeared on behalf of the Maharaja contends that his resignation of his office in the Council of State had been tendered on 7th October and was accepted by the Governor-General on 10th. Therefore at the time of the scrutiny on 11th the statutory bar contained in rule 5 (1) (c) of the electoral rules of 1923 had been removed. The learned Counsel has referred to the regulations framed under rule 15 of the rules with particular reference to regulations XX and XXI. Regulation XX provides for the scrutiny of nominations in the presence of the parties or their agents while regulation XXI provides for the examination of the nomination papers by the returning officer who "shall decide all objections which may be made to any nomination and may either on such objection or on his own motion, after such summary enquiry, if any, as he thinks necessary, refuse any nomination on any of the following grounds :—

- (i) that the candidate is ineligible for election under rule 5 or rule 6, or
- (ii) that there has been any failure to comply with any of the provisions of rule 11 or rule 12 "

Learned Counsel says that what the returning officer has to see in regard to rule 5 is whether the candidate is eligible for election. He has not to see whether he is eligible for nomination. The date of scrutiny is the date with reference to which the eligibility of the candidate for election is to be determined. Further under rule 5, a person shall not be eligible for election as a member of the Council if he labours under certain disqualifications, one of which is that he is a member of the Council, or of any other legislative body constituted under the Act and has made oath or affirmation as such member. The Maharaja had admittedly made the oath as a member, but it is argued that on the date of the scrutiny he had ceased to be a member of the Council of State and therefore, though he might possibly be said to be ineligible on the date on which the nomination paper was presented, the acceptance of his resignation on 10th October, the day before the scrutiny, removed the disqualification.

By a parity of reasoning a person qualified on the date of nomination might be found to be disqualified on the date of scrutiny.

Learned Counsel further contends that in any case the mere tender of the resignation was in itself sufficient to vacate the seat as there is no rule under the Government of India Act under which the Governor-General is empowered to refuse a resignation. A member of an elected body stood on a footing different from a public officer who was required to observe certain formalities such as making over charge of his office. *

Sir Benode Mitter who has appeared on behalf of the respondent contends that the mere fact of the resignation having been tendered does not of itself vacate the seat. Section 93 of the Government of India Act says that "a nominated or elected member of either chamber of the Indian Legislature may resign his office to the Governor-General and on the acceptance of the resignation the office shall become vacant". The same provision is made in section 64 of the Government of India Act where the resignation must be "duly accepted". The power to accept resignation implies also the power to refuse it. It would follow therefore that a member whose resignation had not been accepted continues to be a member until its due acceptance by the Governor-General. The Maharaja thus continued to be a member of the Council of State till the acceptance of his resignation on the 10th October.

Learned Counsel further contends that the eligibility of a candidate depends on whether he was, as a fact, eligible on the date of the nomination. Election is a continuing process in which the nomination is the first step. The nomination is the foundation of a candidate's right to go to the poll and is an integral part of the election. Scrutiny is for the purpose of seeing that what was required to be done had been done. Rule 11(1) says: "Any person may be nominated as a candidate for election in any constituency for which he is eligible for election under these rules." Rule 11(3) provides that a candidate must assent to the nomination and must at that particular point of time have the capacity to accept the nomination and under rule 11(5) he must also have the capacity of nominating election agents to act for him. The Maharaja, it is urged, had not the requisite capacity and was therefore ineligible at the time of the nomination. It is further argued that the date of the scrutiny of the nomination papers as laid down in regulations XX and XXI is not the governing factor in considering the eligibility of the candidate. He must be eligible at the time of the nomination and if he has not the necessary qualifications then, he cannot acquire them between the date of the nomination and the date of the scrutiny.

We are of opinion that under the provisions of rule 11 the date with reference to which the question of the eligibility of a candidate for election is to be determined is the date fixed by Government for the nomination,

and if on that date a candidate is not eligible, his nomination paper must be refused. The object of the scrutiny by the returning officer is to see whether the nomination was valid on the date on which it was made. The nomination is an integral part of the election and it cannot be supposed that a person who is ineligible on the date of the nomination can, in the interval between the nomination and the scrutiny, acquire new rights or that the acquisition of such rights would be sufficient to do away with his pre-existing disqualification.

Various disqualifications which will render a candidate ineligible for election are given in rule 5(1). Rule 5(1) (c) declares a person ineligible for election if he is member of the Council or of any other legislative body constituted under the Act and has made oath or affirmation as such member. In the present case it is admitted that the Maharaja had made oath as a member of the Council of State. It is also conceded that his resignation was not accepted until 10th October, though the date for the presentation of the nomination paper was fixed for 8th October. It is therefore plain that on 8th October, the Maharaja was still a member of the Council of State and was therefore ineligible under rule 11(1). The argument that the mere tender of his resignation automatically terminates his office does not seem to us to be well founded. If it had been so, the words used in sections 93 and 64 of the Government of India Act which require acceptance by the Governor-General of the resignation as a condition precedent to the vacating of the office would be mere surplusage.

We are of opinion therefore that the nomination paper of the Maharaja has been properly rejected by the returning officer and that Mr. Mitter, the returned candidate, has been duly elected.

We estimate the total amount of costs payable for the hearing at 40 gold mohurs and we recommend that that sum be paid by the Maharaja to Mr. Mitter.

CASE No. LXXII

Punjab East (Sikh) 1935

(INDIAN LEGISLATIVE ASSEMBLY.)

SARDAR NARAIN SINGH *Petitioner,*

versus

SARDAR MANGAL SINGH *Respondent.*

Allegation that poster announcing falsely withdrawal of a candidate disbelieved, no report having been made to any presiding officer at any station.

Statements to come within the mischief of the rule must relate to the personal character or conduct of the candidate.

THE election of the respondent was challenged on the ground of his ineligibility to stand as candidate. Undue influence and the publication of false statements were also alleged. The Commissioners held that the petitioner has "failed to prove any of the issues, the onus of which lay on him, or that the returns of the respondent were false in any material particular."

The first question raised was whether Mangal Singh's nomination was improperly accepted. "His name is entered on the electoral roll of the Punjab University constituency which is one of the constituencies prescribed for elections to the Punjab Council. It is contended that this fact does not, under rule 6 (1) (a) make him eligible for nomination because the Punjab University constituency is said to be described in the first schedule of the Punjab electoral rules as 'non-territorial', and therefore, it is argued, it is not situate in the Punjab Province within the meaning of rule 6 (1) (a) aforesaid. In our opinion this argument is wrong. Elections to the Punjab University constituency are restricted to persons who reside in the Punjab (see rule 9 of schedule II of the Punjab electoral rules). The phrase 'non-territorial' in schedule I appears to have reference only to the constituency of Baloch Tumandars (regarding which no residential or property qualification is prescribed) and not to the Punjab University constituency. If, however, it is also intended to be a description of the Punjab University constituency, then the description in question cannot be said to alter the actual situation of that constituency which by the fact that its electors must have a residence in the Punjab is actually a constituency situate in the Punjab. In the interpretation of rule 6 of the Legislative Assembly electoral rules actualities must be given preference over verbal description if they are regarded as being in conflict, though in our opinion no such conflict does exist.

"It was also contended that rule 6 (1) (a) should be interpreted in the sense that the words 'prescribed for elections to the Punjab Council by rules' should be taken as qualifying the phrase 'the electoral roll' and not as qualifying the phrase 'a constituency situate in the same province'. It was not, however, explained to us what can be meant by the phrase 'the electoral roll prescribed for elections to the Provincial Council', and we therefore reject this contention. It follows from what has been said above that Mangal Singh was eligible for election as a member of the Legislative Assembly by virtue of the fact that his name is entered on the electoral roll of the Punjab University constituency, and we decide the issue against the petitioner."

Undue influence or publication of false statements was alleged in connection with five documents exhibited as P.W. 47/23, P/16, P/17, P/11 and P/12.

P.W. 47/23 is a poster prepared by Ishar Singh (P.W. 58). It contains information about the number of votes cast for Mangal Singh and the total number of votes polled on the 1st November, 1934 in five districts. It contains no mention of votes polled for other candidates. It purports to be a résumé of the approximate result of that day's polling so far as Mangal Singh was concerned. Its preparation, printing and publication do not, in our opinion, amount to undue influence in any degree, and the statements contained in it are not proved to be false.

P/16 is a poster purporting to be published by one Ranjodh Singh (P.W. 60) stating that Harbans Singh who was a candidate for the same election was not a nominee of the Central Akali Dal. There is no evidence of a reliable character that Mangal Singh, respondent, had anything to do with the printing and publication of this document. Balwant Singh (P.W. 61) is the editor of a newspaper in whose newspaper a letter (P.W. 60/2) appeared which purports to give the same information as P/16. This witness clearly deposed that this letter was given to him for publication by Ranjodh Singh (P.W. 60). Whether Balwant Singh is telling the truth or Ranjodh Singh may be a matter of doubt, but it is clear that they are not both telling the truth, and in any case, even if Ranjodh Singh was not the author of the document P/16, it cannot be held, on the evidence before us, that Mangal Singh, respondent, was its author.

P.W. 17 is a poster which is alleged to have been distributed at various polling stations during the polling, and it contains a statement that Harbans Singh, one of the candidates, had withdrawn from the contest. In our opinion the evidence to the effect that this poster was being distributed during the polling is not of a convincing or reliable character. Sardar Harbans Singh himself, as P.W. 57, admits, that he was present at various polling stations such as Gurah and Moga where it is alleged that this poster was being distributed, and also that he had his agents at the various polling stations, but the distribution of this poster at these polling stations was not seen by himself, nor was it reported to him by his agents. No report was made to any presiding officer at any polling station regarding the distribution of this poster. Such a poster could easily have been printed at any time after the election was over in order to create false evidence in support of the petition, and in view of this possibility and the unsatisfactory character of the evidence regarding the alleged distribution of this poster, we do not think that any connection between it and the respondent Mangal Singh can be regarded as established.

P/11 and P/12 are issues of a newspaper called "Nawan Dhandhora" dated 8th October, 1934 and 1st of November, 1934. With this newspaper the respondent Mangal Singh no doubt has had a connection, since he was for sometime the president of the committee who owned and managed this newspaper. The two issues in question contain articles regarding

Harbans Singh, who, as already stated, was a candidate for the election, and the question which we have to decide is whether these articles fall within the scope of rule 4 of part I of schedule V of the Legislative Assembly electoral rules, that is to say whether they contain false statements in relation to the personal character or conduct of Sardar Harbans Singh. We have heard lengthy arguments on the subject of these publications, and they have been explained to us fully. Our considered view is that the statements which they contain about Harbans Singh do not relate to his personal character or conduct, but relate only to his public character and conduct, and they must, therefore, be regarded as falling outside the purview of rule 4 above mentioned.

On the above findings we hold that the petitioner has not succeeded in making out his case under the issues which concern the alleged making of false statements and the alleged exercise of undue influence.

It is not proved that any poster was issued by the respondent which does not bear the name and address of the printer and publisher thereof except that in one case the name of the city where the printer and publisher has his address is omitted. This omission did not, in our opinion, affect materially the result of the election. The allegation in question has reference to rule 8 of part II of schedule V. Rule 44 (1) (a) only makes an election void if a corrupt practice which falls under part II of schedule V has materially affected the election. As that has not occurred in this case, the election is not void on account of the omission of the name of the city from the poster in question.

An attempt was made by the petitioner to prove that detailed vouchers have not been filed with the returns of the respondent, and that the vouchers are false. No falsity in these vouchers has been, in our opinion, established. In the case of Joginder Singh (P.W. 8), this witness denied what purported to be his signature on three receipts, but he does not deny that he was paid the sums in question to which these purport to relate, and if that is the case there can have been no object in substituting false for true vouchers. There is also evidence of Hari Kishen Datt (P.W. 49) that Joginder Singh did sign these vouchers, and there seems no reason to disbelieve this witness.

Regarding other items there is no definite evidence that any of them is false, and the most that the petitioner could do was to try and throw suspicion on some of them, but we are not convinced that these suspicions are well-founded.

It is, thus, apparent that the petitioner has failed to prove any of the issues, the onus of which lay upon him, and has failed to prove either that the election was void or that the returns of the respondent were false in any material particular, and we report accordingly that the election was not void.

As regards costs, a large number of witnesses was examined by both sides and many documents were also produced and much time was taken in arguing the case. We consider that a lump sum of twelve hundred rupees should be paid as costs of the proceedings by the petitioner, Narain Singh, to the respondent, Mangal Singh.

CASE No. LXXIII
Punjab Landholders, 1924
(PUNJAB LEGISLATIVE ASSEMBLY.)

S. JAIDEV SINGH	..	..	..	<i>Petitioner,</i>
				<i>versus</i>
B. UJAGAR SINGH AND OTHERS	..	..	..	<i>Respondents ;</i>
				<i>and</i>
M. MUHAMMAD INSHA ULLAH	..	..	..	<i>Petitioner,</i>
				<i>versus</i>
B. UJAGAR SINGH AND OTHERS	.	..	..	<i>Respondents.</i>

In the case of postal voting it is essential that the covering letter should accompany the closed envelope containing the ballot-paper. It must not be inside the envelope containing the latter.

Votes received after the date advertised should not be counted.
The Post-office is the agent of the voter, not of the returning officer.
Irregularities in ballot-papers examined on scrutiny.

THE election of B. Ujagar Singh to the Legislative Assembly on behalf of the Punjab Landholders' constituency has been called in question by separate petitions by S. Jaidev Singh and M. Muhammad Insha Ullah, who were his rival candidates at the last election. The petitions are based on identical pleas and can be conveniently disposed of together.

The result of the poll was declared as follows :—

			<i>Votes.</i>
Ujagar Singh	.	..	180
Jaidev Singh	..	..	167
Muhammad Insha Ullah	..	..	166
Jas Jit Singh	..	..	93
Muhammad Ibrahim Ali Khan	..	..	88

The petitioners allege that certain votes were wrongly rejected by the returning officer, while others were wrongly counted for the respondent Ujagar Singh, and claim that on a recount and scrutiny, they would be found to have the majority of lawful votes. The trial of the petitions resolved itself into a scrutiny of the ballot-papers and determination of the validity of the votes claimed or objected to by the parties. On a scrutiny of the ballot-papers, only the votes detailed in the lists A, B and C attached to this report were claimed or objected to by the parties. The rest of the pleas having been given up, it is unnecessary to refer to them in this report.

The real dispute in the case centres round ballot-papers falling under (1) and (2) in list A, which were left out of account by the returning officer, but which the petitioners want to be looked into. It is conceded that if these ballot-papers cannot be taken into account according to the rules, the decision on the other ballot-papers, which have been either claimed or objected to by the parties, would not affect the result of the election, as in that case respondent Ujagar Singh will still have a majority of lawful votes.

As regards the 36 ballot-papers falling under no. (1) in list A, which were received in envelopes without any covering letters, the position is briefly as follows. The voting being by post, the voters had to send in their votes to the returning officer according to regulations 43 to 45 of the "Regulations relating to the nomination and election of members of constituencies in the Punjab to the Legislative Assembly" (*vide* regulations published under notification no. 128 at page 129 of the *Punjab Gazette Extraordinary*, dated 28th August, 1923). According to these regulations, the voter is required to mark his vote on the ballot-paper sent to him and enclose the ballot-paper in an envelope. Along with this envelope, he is required to send in a covering letter bearing his signature and electoral number, and authenticated by a Judge or Magistrate in the manner specified in regulation 55. The voter is

required to put the closed envelope containing his marked ballot-paper and the covering letter in another envelope and then send the latter, by post or otherwise, so as to reach the returning officer on the day preceding that fixed for counting of the votes. According to the returning officer's declaration, the 36 ballot-papers falling under (1) in list A were received in closed envelopes, but the envelopes were not accompanied by any covering letter at all. The eight ballot-papers falling under (2) in the same list were not received by him till the day fixed for counting of the votes. Consequently, these ballot-papers were not looked at by him and were left wholly out of account, according to regulations 43-45.

As regards the 36 ballot-papers received without any covering letters, the contention on behalf of the petitioner Jaidev Singh is that the covering letters are probably in the inner envelopes along with the ballot-papers and that the returning officer should have opened the inner envelopes to see if the covering letters were there. It was conceded that the voters did not strictly comply with regulation 45 in not keeping the covering letter outside the envelope containing the ballot-paper; but it was urged that the regulations referred to above are only "directory" and not "mandatory" like the electoral rules themselves. In support of this argument was cited the well-known English case, *Woodward vs. Sarsons* in which it was held that certain rules in the schedules of the Ballot Act were "directory" as opposed to the "absolute enactments" in the body of the Act itself, and that while the latter have to be strictly complied with, it is sufficient if the "directory" enactments are "substantially" complied with. We do not, however, think that there is any real analogy between the rules and the regulations relating to the Legislative Assembly elections on the one hand and the English Ballot Act and the rules given in the schedule of that Act. In section 28 of the English Ballot Act of 1872, the provisions of the schedules are referred to as "directions" and on considering the scheme of the Act and the schedules, the Judges held in *Woodward vs. Sarsons* that the rules given in the schedules, "for the most part, if not invariably, point out the mode or the manner of doing what the sections enact shall be done". A perusal of the rules and regulations relating to the Legislative Assembly will show that the regulations cannot be looked upon as mere directions for carrying out what is contained in the rules themselves. The rules as well as the regulations are framed by the same authority, viz. the Governor-General and it is laid down in the notification relating to the regulations that they "shall apply" to the conduct of elections of members to the Legislative Assembly. The regulations contain many important provisions as regards the conduct of the elections, corresponding to those which are contained in the English Ballot Act itself (*cf.*, e.g. regulations 16 and 17 with section 2 of the Ballot Act). The regulations appear to have been separated from the rules simply to facilitate the making of provisions

suited to the varying conditions and requirements of the different Provinces in India, and not because of their having less force or validity than the rules themselves.

The points in respect of which the rules in the schedule of the Ballot Act were held to be merely directory in *Woodward vs. Sarsons*, were comparatively minor ones, e.g. whether it was essential for a voter to make an exact cross against the name of the candidate, or whether a mark approximately like a cross or answering the same purpose would suffice and so forth. The point at issue before us, viz. whether it was or was not essential for the voter to keep the covering letter outside the envelope containing the ballot-paper, cannot, in our opinion, be looked upon as a trivial one. The covering letter is intended to identify the voter and plays an important part in the system of voting by post. Without the covering letter there would be nothing to show to the returning officer that the envelope containing the ballot-paper came from a registered voter at all. The returning officer could not have opened the inner envelope to see if the voter had by mistake enclosed the covering letter in it along with the ballot-paper; for that would have violated the *secrecy* of the ballot,—a cardinal principle of the system of voting by ballot. Regulations 46 and 47 lay down that the returning officer is to put into the ballot-box only those envelopes which are accompanied by proper covering letters. These envelopes alone are opened in the presence of the candidates and can be taken into account in declaring the result of the poll (*vide* regulation 48). It was urged that the returning officer would have to open the inner envelopes, at any rate, at the time of making out the account of ballot-papers, as laid down in regulation 48; but it seems obvious from the rule that this may have to be done only after declaring the result of poll, when the papers are despatched to the Deputy Commissioner for safe custody. The fact has no bearing on the result of the poll. It was finally urged that the electoral rules simply say that the voting shall be by ballot [*vide* rule 14(4) of the Legislative Assembly rules] and do not specifically lay down (like section 2 of the Ballot Act) that the voting shall be secret. But the system of voting by ballot in itself implies secrecy. A reference to regulations 12, 15, 16 and 17 will leave no doubt that secrecy is intended to be as essential in India as in England. It is obviously for the sake of secrecy that regulation 45 lays down that the ballot-paper should be closed in an envelope and the covering letter along with that envelope put in another outer envelope. Otherwise this elaborate procedure would be perfectly meaningless.

Regulation 41 clearly lays down that regulations 42 to 48 *shall apply* to elections for the Landholders' constituency. Regulations 43 to 45 which prescribe the procedure to be followed by the voters are in a mandatory form and a copy of these is supplied to the voters. There is,

therefore no excuse for any voter for not complying with these regulations. In the face of the clear and mandatory provisions of the regulations it is not open to us to treat them as merely "directory" and condone non-compliance with the same. Such a procedure would be opposed to the well-established principles of interpretation of statutes and would result in uncertainty and confusion. Regulation 45 lays down that "*account will not be taken of the ballot-paper in the closed envelope unless the covering letter, which accompanies it, bears on it the signature and electoral number of the elector and is countersigned and sealed with the seal of his office by the attesting officer*". It was urged that this rule makes no specific provision for the case where there is no covering letter at all. But we do not think there is any force in this contention. According to regulation 45, the only ballot-papers in closed envelopes, which can be taken into account, are those which are accompanied by properly authenticated covering letters. The others are all to be excluded and envelopes received without any covering letters also clearly fall under this category. In the case of these envelopes which are accompanied by covering letters but the covering letters are not duly authenticated, an exception is created by regulation 47 and they are treated as "tendered ballot-paper"—so as to be subject to scrutiny by an Election Court. But there is no such provision for envelopes containing ballot-papers which are not accompanied by any covering letter at all. The result is that those ballot-papers in closed envelopes, which are not accompanied by any covering letters, cannot be taken account of even by us. It was urged that regulation 37 alone gives the cases in which a ballot-paper shall be rejected. But regulation 37 refers only to those cases where the ballot-papers are actually scrutinized by the returning officer. Regulations 43 and 45, on the other hand, refer to cases where the ballot-papers in the closed envelopes are left altogether out of account owing to non-compliance with the regulations.

It was argued that the above interpretation would mean great hardship and that in the case of university elections the practice is to open envelopes which are not accompanied by covering letters. As regards the former, this is not the only case where non-compliance with regulations results in a heavy penalty. What may appear to be comparatively trifling errors, would make a vote invalid under regulation 37. The right of voting is a privilege—as distinguished from a duty—and when a statute lays down regulations and formalities for the exercise of a privilege, a rigorous observance of the same is taken to be intended by the legislature and is considered essential (*cf.* Maxwell : Interpretation of Statutes, 5th edition, pages 599-600). As to university elections, we do not know exactly what are the regulations governing the same and, in any case, the practice in those elections cannot be of any help in the face of clear regulations on the point at issue before us. We hold

accordingly that the 36 envelopes received without covering letters were rightly left out of account by the returning officer and cannot be looked into.

We come next to the eight envelopes, which were not received by the returning officer on the 5th December—the day preceding the date fixed for counting of votes—and were, therefore, rejected under regulation 43. It was argued that these envelopes did reach Lahore on the 5th December and that the returning officer should have made special arrangements to receive them from the Post-office. From the post-marks, these envelopes appear to have been delivered on the 6th December. There is nothing before us at present to show that the letters did reach Lahore on the 5th December; but even assuming that the petitioner is in a position to prove this (—we were told that evidence on the point could be produced, if the argument was accepted), we find ourselves quite unable to accept the contention that it was the returning officer's duty to make special arrangements to receive them. There is absolutely nothing in the regulations to support this contention. According to regulation 45, a voter may send the ballot-paper by *post or otherwise*. It is, however, his business to see that it reaches the returning officer on the due date (*cf.* regulations 43 and 45). Even if the envelopes were lying in the Post-office, there was no obligation on the returning officer to make special arrangements to take delivery from the Post-office. The Post-office, in the present instance, was clearly the agent of the petitioner and not of the returning officer. Regulation 43 lays down that “no account will be taken of the ballot-paper unless *it is received* by the returning officer not later than the day before that fixed for the counting of votes”. The envelopes, in the present instance, were admittedly *not received* on the due date, and were, therefore, in our opinion, rightly left out of account by the returning officer.

We may add that we have heard the Government Advocate also on the above points and he supported the conclusion we have reached.

As regards the remaining ballot-papers in dispute the number of votes, which are either claimed or objected to by the parties, are as follow :—

	Claimed.	Objected <i>re.</i> Ujagar Singh.	Objected <i>re.</i> Muhammad Insha Ullah.
Jaidev Singh ..	7	2	1
Muhammad Insha Ullah ..	2	....	...
Ujagar Singh . .	2	....	....

Respondent, Ujagar Singh, had a majority of 13 votes over Jaidev Singh and 14 votes over Muhammad Insha Ullah. It is, therefore, clear that even if the above claims and objections are decided in favour of the petitioner, respondent, Ujagar Singh will still have a majority of lawful votes, and the result of the election will not be affected, in any way. We are clearly of opinion that the five ballot-papers falling under (3) in list A, which were classed as "tendered" votes under regulation 47, can be scrutinized by us and the ballot-papers on which there is some writing from which the voter can be *prima facie* identified, must be held to be invalid. But we consider it unnecessary to enter into any detailed discussion of these points, as the result of the election cannot be affected by the decision with regard to these ballot-papers.

On the above findings, it is clear that both the petitions must fail. We report accordingly under rule 45 that B. Ujagar Singh, respondent, was duly elected and that the petitions should be dismissed.

As regards costs, the points in dispute were technical and some of them arguable. In view of the comparatively narrow majority, it cannot be said that the petitioners had no justification at all for lodging the petitions. In the circumstances, the costs need not be heavy. Each of the petitioners should pay Rs. 250 only as costs to the respondent, Ujagar Singh.

LIST A.

Votes claimed or objected to by Jaidev Singh.

Exhibit nos.	Description.	Claim or objection
(1) E/1 to E/36	These envelopes containing ballot-papers were received without any covering letters and were left out of account by the returning officer.	The envelopes should have been opened by the returning officer and the covering letters would probably be found inside, petitioner therefore, claims such of these votes as may have been cast for him and may be valid otherwise.
(2) H/1 to H/8	Received after 5th December, 1923. These were rejected by the returning officer as received too late.	These letters did arrive in Lahore on the 5th December and the returning officer would have received them, if he had made special arrangements for receiving them after 4 P.M. on that day. Hence these votes should be looked into.
(3) F & 1/12 to 1/14 & 1/18.	Five votes which were accompanied by covering letters but were left out of account by the returning officer on the ground that the covering letters did not bear the seal of the attesting officer.	These are to be treated as "tendered" votes under regulation 47, and the validity of these has to be decided by the Commission.

LIST A —(contd.)

Exhibit nos.	Description.	Claim or objection.
(4) B/1 & C/1	Rejected by the returning officer on the ground that the ballot-paper contains writing by which the voter can be identified.	The writing on the ballot-papers is not sufficient to identify the voters and hence the votes should not have been rejected.
(5) A/2 ..	A ballot-paper with two marks. This was counted as a valid vote for B. Ujagar Singh.	The ballot-paper was bad owing to the two marks, and should not have been counted as a valid vote.
(6) A/3 ..	A ballot-paper with names of the candidates written in Urdu. This was counted as a valid vote by the returning officer for respondent. Ujagar Singh.	The Urdu writing is sufficient to identify the voter and hence this should not have been counted as a valid vote.
(7) A/1 ..	A ballot-paper with names of the candidates written in Urdu. This was counted as a valid vote for Muhammad Insha Ullah.	The Urdu writing is sufficient to identify the voter and hence this should not have been counted as a valid vote.

LIST B.

Votes claimed by Ujagar Singh.

Exhibit nos.	Description.	Claim.
B/2 ..	A vote for Ujagar Singh. Certain marks were apparently made by the voter against the names of other candidates but these marks were erased. The returning officer rejected this paper on account of the erasures.	There being a clear mark against the name of Ujagar Singh and none against any other name, the erasures did not matter and the vote should have been counted.
G/1 ..	This was rejected by the returning officer, because the electoral number given on the covering letter does not correspond with the name of the voter signing it.	The mistake in the number did not invalidate the vote.

LIST C.

Votes claimed by Muhammad Insha Ullah.

Exhibit nos.	Description.	Claim.
B/3 ..	A vote for Muhammad Insha Ullah. There are two crosses against the name of Muhammad Insha Ullah and something looking like initials between This was rejected by the returning officer.	It is not shown that the so-called initials are those of the voter and are sufficient to identify the voter. The votes should have been, therefore, counted as valid.
B/4 ..	A vote in favour of Muhammad Insha Ullah. The ballot-paper was accompanied by a letter in Urdu by the voter himself and hence rejected by the returning officer.	There is no writing on the ballot-paper itself from which the voter could be identified. Hence this was a valid vote.

CASE No. LXXIV

Punjab North (M.) 1924

(LEGISLATIVE ASSEMBLY.)

RAJA GHAZANFAR ALI *Petitioner,*

versus

CHAUDHRI BAHAWAL BUX AND OTHERS .. . *Respondents.*

A petitioner may not be able to give the necessary particulars unless he is granted a scrutiny of the votes.

A recount should usually be granted when the majority is a narrow one.

Marking of votes examined. On the recount petitioner was declared to be elected.

CHAUDHRI BAHAWAL BUX, respondent, was declared elected to the Legislative Assembly on behalf of the North Punjab Muhammadan constituency at the last general election, the result of the poll being as follows :—

			<i>Votes.</i>
Chaudhri Bahawal Bux	..	..	397
R. Ghazanfar Ali	..	..	394
M. Mohd. Ashraff	..	..	293
P. Taj-ud-din	..	..	71

R. Ghazanfar Ali, petitioner, has called in question the election on the grounds that the returning officer wrongly rejected certain votes in his favour as invalid (paragraph 4 of the petition), and wrongly counted certain votes in favour of the respondent although they were, as a matter of fact, invalid (paragraph 5 of the petition). He also alleged that two ballot-papers were entirely missing and the election was, therefore, void for uncertainty. He claimed that, as a matter of fact, he had a majority of lawful votes, and prayed for a scrutiny and recount and a declaration that he is the duly elected candidate.

The respondent denied the correctness of the petitioner's allegations. He pleaded that only one vote was missing and that as the respondent had a majority of three, the result of the election could not be affected by the missing vote. He disputed the right of the petitioner to demand a scrutiny without giving further particulars with regard to the votes claimed or objected to.

The petitioner, on the other hand, claimed that he was entitled to a scrutiny on the allegations made in support of which he also filed an affidavit. He contended that it was impossible for him to give any particulars until a scrutiny was ordered and until he had an opportunity of inspecting the ballot-papers properly. The following preliminary issues were, therefore, framed and were argued first :—

- (1) Should the petitioner be required to give further particulars (e.g. the number of votes for petitioner declared invalid, the grounds on which they were declared invalid, etc.) with respect to the allegations in paragraphs 4 and 5 of the petition at this stage ?
- (2) Is the petitioner entitled to a scrutiny on the allegations made in paragraphs 4, 5 and 7 of the petition as they stand at present ?

The electoral rules require particulars to be given as regards any corrupt practices alleged in the petition but are silent as regards the form of the petition and the procedure to be adopted when a scrutiny is demanded, though the rules evidently contemplate a scrutiny petition (*cf.* rule 44(c) and regulation 37(2) with respect to the elections to the

Legislative Assembly). Counsel for the respondent has relied upon the English practice, according to which each party has to deliver before trial a "list of votes intended to be objected to and of the heads of objection to each such vote" (*vide* Rogers on Elections, 19th edition, volume II, page 298). But the English practice is supported by a specific rule on the point (see rule 7, Election Petition rules). The present petition cannot obviously be held to be bad for want of particulars, as there is no such rule in force in India. As regards the question whether we should require the particulars to be supplied under the general provisions of the C.P. Code, or on the analogy of the English practice, we consider that there is much force in the contention of the petitioner, that he cannot be expected to furnish any definite particulars until there is a scrutiny of the ballot-papers and he has an opportunity to inspect them properly. In England, such an inspection is apparently permitted "for the purpose of instituting or maintaining a prosecution for an offence in relation to ballot-papers or for the purpose of a petition questioning an election or return" (*vide* rule 40 of the rules under the Ballot Act of 1872, pages 729-30, Rogers on Elections, volume II). The corresponding rule in India (*vide* regulation 49 of the regulations framed under rule 15 of the Legislative Assembly electoral rules) lays down, on the other hand, that the ballot-papers, etc. "shall not be inspected or produced except under the order of a competent court or of Commissioners appointed to hold an inquiry in respect of an election". It is, therefore, clear that the petitioner was not in a position to inspect the ballot-papers and obtain the necessary particulars before lodging his petition. Regulation 36(c) with respect to the Legislative Assembly election, no doubt, provides that at the time of counting the votes, the returning officer "shall allow the candidates and their agents reasonable opportunity to inspect, without handling the ballot-papers". But it would be scarcely possible for a candidate or his agent to obtain at that time such definite particulars as regards the votes to be objected to, as are required in England to be delivered on a scrutiny petition (*cf.* Forms of scrutiny list at page 937 of Rogers on Elections, volume II, 19th edition). The petitioner has filed an affidavit stating the procedure that was adopted by the returning officer at the time of counting the votes, and alleging that it was impossible for him to scrutinize all the ballot-papers, as four persons were sorting them. The affidavit was not filed with the petition but Counsel for the petitioner has explained that he was doubtful on the point, as no definite procedure was prescribed by the Indian rules. He had, however, expressed his readiness to file the affidavit at the very first hearing and the point is, therefore, not material. The respondent has not filed any counter affidavit denying the correctness of the allegations made in the affidavit filed by the petitioner. We think that, in the circumstances, the petitioner or his

agent could not have had sufficient opportunity to scrutinize the votes and that he cannot be reasonably required to give the necessary particulars without a further and careful inspection.

The petitioner has alleged in his petition that he would be found, on a scrutiny of the votes, to have had a majority of votes and this is practically all that is *essential* to allege in such a petition in England (*vide* Fraser's Law of Parliamentary Elections and Election Petitions, 3rd edition, page 224). It was urged that in the *Tanjore* case, a recount was refused when it was prayed for on the basis of "nebulous allegations" (see page 675). But it appears that the application for a recount was made in that case only during the course of the inquiry. In the present instance, the petition itself is chiefly for a scrutiny and recount and both have been specifically asked for in the petition. Moreover, it is to be remembered that the respondent Bahawal Bux, in the present instance, had a very narrow majority, viz. of three votes only over the petitioner. In England, when the majority is a narrow one, a recount is granted almost, as a matter of course (*vide* Fraser's Law of Parliamentary Elections and Election Petitions, 3rd edition, page 222).

We, therefore, hold that the petitioner was entitled to a scrutiny, in the circumstances of the case, on the basis of the allegations made in the petition and the affidavit. Scrutiny was accordingly made of all the accepted and rejected votes. (There were no "tendered" votes). The ballot-papers given in the lists A and B attached to this report were claimed or objected to by the petitioner and respondent respectively on the grounds shown therein. We shall deal first with the ballot-papers in the list A, which were claimed or objected to by the petitioner.

LIST A.

Exhibit A-2.—Was clearly a vote for the petitioner and was evidently included in the votes for the respondent, Bahawal Bux, by a mistake? This was not disputed by the respondent.

Exhibit C-1.—The partial cross-mark against the name of Mohd. Ashraff appears to us to have been caused by folding the paper after the cross-mark was made in ink against the name of the petitioner. This will clearly be seen by folding the paper and holding it against the light. The contention on behalf of the respondent that the ballot-paper must be held to be invalid under regulation 37(b) owing to there being cross-mark against the names of more than one candidate (no matter how they are caused) cannot hold good, as there is no proper cross-mark at all against the name of Mohd. Ashraff, while the cross-mark against the name of the petitioner is perfectly clear. It may be mentioned that in England also, when additional marks were caused by folding, the ballot-papers have been held to be

good (*vide* the two bottom figures representing ballot-papers, nos. 928 and 1364 on page 157 of Rogers on Elections, volume II, 19th edition).

Exhibit C-2.—The mark against the name of the respondent, Bahawal Bux is not a cross and has been scored out. There is, on the other hand, a clear cross-mark against the name of the petitioner. The mark against the name of the respondent does not give rise to any uncertainty and does not matter in the circumstances. The case does not fall under regulation 37. In similar circumstances, ballot-papers have been held to be valid in England (*cf.* 1st and 2nd figures respectively on pages 164 and 166 of Rogers on Elections, volume II, 19th edition).

Exhibit C-3.—This is practically a case similar to exhibit C-2. There is only a line against the name of respondent, Bahawal Bux, while there is a clear cross-mark against the name of the petitioner. The latter must be taken to be evidence of intention to vote for the petitioner. In similar circumstances, votes have been held to be valid in England in favour of those candidates against whose names there were clear cross-marks, as distinguished from other marks such as mere lines, etc. (see, e.g. the second and third figures of ballot-papers on page 168 of Rogers on Elections, volume II, 19th edition).

Exhibit C-4.—In this case, there is a cross-mark against the name of the petitioner, but in addition there appear the Urdu letters *جس* which have been crossed out. The contention on behalf of the respondent is that this is handwriting of the voter from which the voter can be identified. This contention must, we think, prevail. The voter appears to have started writing his name and then crossed out the letters. In similar circumstances, votes have been held to be invalid in the *Punjab South East Towns* case (see page 584). In England also, letters in addition to a cross have been held to invalidate a vote in some cases (see, e.g. figure of ballot-paper no. 410 on page 160 of Rogers on Elections, volume II, 19th edition).

Exhibit C-5.—In addition to a cross, there is some other mark—apparently unmeaning—in the blank space opposite the name of the petitioner. In the absence of any evidence to that effect, this mark by itself cannot be taken to be sufficient to identify the voters and cannot, therefore, invalidate the ballot-paper (*cf.* the figure showing ballot-paper no. 926 and the remarks with respect to the same in *Woodward vs. Sarsons*, at pages 373 and 383 of Fraser's Law of Parliamentary Elections and Election Petitions, 3rd edition).

Exhibit C-6.—In this case the voter has put a circle against the name of the petitioner, while there is no other mark of any kind against the names of other candidates. According to the rules, the voter ought to put a cross against the name of the candidate for whom he intends to vote (*vide* regulation 17 of the Legislative Assembly regulations). The contention on behalf of the respondent is that a circle represents no vote at all and hence the ballot-paper should be held to be invalid under 37(c). The point is not free from doubt. The English decisions in similar cases are, no doubt, in favour of the petitioner; but in England a distinction has been drawn between the rules in the schedules of the Ballot Act and the enactments in the body of the Act itself. It has been held in *Woodward vs. Sarsons* that while the absolute enactments in the Act must be strictly obeyed, the rules in the schedules are merely "directory" and substantial compliance is sufficient. There seems scarcely any justification for taking the regulation 17 (referred to above) to be merely "directory" in India. On the other hand, when there is a clear circular mark against the name of the petitioner, and no other mark whatsoever against the name of any other candidate, it does not seem reasonable to hold that "no vote is recorded" on the ballot-paper and that, therefore, it is invalid under regulation 37(c). It was held in the *Punjab South East Towns* case (see page 584), that unless a case strictly fell within regulation 32 (—which corresponded to the present regulation 37), the mere breach of some other regulation—e.g. the lack of the official mark, did not render a vote invalid. Now, in the present instance, regulation 17, no doubt, requires the voter to put a cross-mark against the name of the candidate for whom he wishes to vote and this regulation has been violated. But regulation 37 does not specifically lay down that a ballot-paper without a cross-mark is to be rejected as invalid. Clause (c) of the regulation has been cautiously worded and only lays down that a ballot-paper is invalid "if no vote is recorded thereon". On the whole, we think it preferable to hold that the circular mark represents a vote and the case does not fall within the wording of regulation 37(c). We, therefore, take this to be a valid vote for the petitioner.

Exhibit C-7.—This was conceded by the Counsel for the respondent to be a valid vote for the petitioner and need not, therefore, be discussed.

We now pass on to the list B.

Before proceeding to discuss the claims and objections of the respondent in list B, we may briefly notice a preliminary objection,

which was raised by the Counsel for the petitioner. It was urged that as the respondent had not taken any objection in his recri-minatory petition to the validity of the votes cast for the petitioner, he was not entitled to take any objection to their validity even on scrutiny. The proviso to rule 42 of the Legislative Assembly rules was relied upon in this respect. These rules, however, do not, as already pointed out, specifically lay down any procedure for a scrutiny petition and we doubt if the proviso in question can be held to be applicable to the present case. In England, the respondent is allowed to take such objection on scrutiny (*cf.* rule 53 of 31 and 32 Vict. C. 125, at page 705 of Rogers on Election Petitions, volume II), and a scrutiny could hardly be fairly conducted otherwise. However, we consider it unnecessary to discuss the point further, as we are clearly of opinion that the claims and objections of the respondents in list B must all be disallowed.

LIST B.

Exhibits B-1 to B-18.—These votes for the petitioner, which were counted as valid by the returning officer, are objected to on the ground that there are faint and partial impressions of thumb-marks thereon from which the voter can be identified. The impressions are, however, extremely faint and partial and are in our opinion quite insufficient for identifying the voter. It is not difficult to see how these impressions have been caused. According to regulation 16, the voter has to affix his signature or thumb-impression on the counterfoil of the ballot-paper, before he receives the ballot-paper on which he has to record his vote. The marks on exhibits B-1 to B-18 appear to have been inadvertently caused when the voters were handling the ballot-papers after affixing their thumb-impressions. None but an expert can, of course, identify a person from thumb-impressions and that too can only be done when he gets the thumb-impression of the person concerned for comparison. The impression on the ballot-paper, by itself, is not sufficient for identification. Moreover, the impressions are, as already stated, very faint and partial and consequently useless even for such comparison. We, therefore, hold that these have been rightly held to be valid votes for the petitioner.

Exhibits B-19 and B-20.—There are clear cross-marks against the name of the petitioner and the additional dot against the name of Mohd. Ashraff on exhibit B-19 and the faint lines on exhibit B-20 are immaterial. These votes are similar to exhibits C-2 and C-3 and must be held to be valid for reasons given in the case of those votes.

Exhibit D-1.—This is a case similar to exhibit C-4. There is a cross against the name of the respondent, Bahawal Bux, but along with it are some Urdu letters, which have been scored out. For reasons given in the case of exhibit C-4, this ballot-paper also must be held to be invalid.

The net result of the above is that the respondent, Bahawal Bux, loses the vote, exhibit A-2 and the same goes to the petitioner. The petitioner also gains the votes, exhibits C-1, C-2, C-3, C-5, C-6 and C-7. Thus the petitioner gains seven votes in all. The petitioner was declared by the returning officer to have secured 394 votes; but on a recount, the number of ballot-papers found by us in the sealed envelope containing the votes cast for petitioner was only 393. Possibly, exhibit A-2, which is really a vote for the petitioner, was included by mistake in the sealed envelope containing the votes of respondent, Bahawal Bux. However that may be, it will be clear from the above that the petitioner and the respondent had the following number of valid votes :—

Bahawal Bux	..	.	.	397—1=396 votes.
Ghazanfar Ali	..	..	..	393+7=400 ,,

The petitioner has thus a majority of four lawful votes. The number of votes cast for the other candidates was also checked and found to be correct.

As regards the allegation in the petition, that one or two ballot-papers were missing, we may note that we found at the time of recount that altogether 1,169 votes had been cast for the various candidates, while according to the account of the ballot-papers received by the returning officer from the Deputy Commissioners (—which was also produced before us and checked) only 1,167 ballot-papers had been received. There were thus two ballot-papers in *excess*. It is not clear how this excess occurred. However, as the petitioner has now been found to have a majority of 4, this excess of two ballot-papers cannot obviously affect the result of the election and does not need any further inquiry.

On the above findings, we report under rules 44 and 45 that the result of the election was materially affected by the improper rejection of certain valid votes in favour of the petitioner, Ghazanfar Ali, and that the petitioner, as a matter of fact, having secured a majority of lawful votes, is entitled to be declared duly elected. As the petition was rendered necessary only by errors in accepting or rejecting votes, we recommend that the parties should be left to bear their own costs.

LIST A.

Exhibit nos.	Description	Claim or objection by petitioner.
A-2	.. A vote for petitioner, but was, through oversight, counted as a vote for the respondent, by the returning officer.	The vote should have been counted for the petitioner.
C-1	.. A ballot-paper with a clear cross-mark against the name of the petitioner and a partial cross-mark against the name of Mohd. Ashraff, another candidate. This was rejected by the returning officer.	The portion of a cross-mark against the name of Mohd. Ashraff is not really a separate mark at all made by the voter. It is merely a partial ripening of the cross-mark in ink against the name of petitioner, caused by the folding of the paper. The vote should be counted for petitioner.
C-2	.. A ballot-paper with a cross-mark against the name of the petitioner and some mark which was crossed out, against the name of the respondent. Rejected by the returning officer as invalid.	There is a clear cross against the name of the petitioner and the other mark, which has been crossed out, does not matter. This is a valid vote for petitioner.
C-3	.. A ballot-paper with a cross-mark against the name of the petitioner and a mere line against the name of the respondent. Rejected by the returning officer.	This was a valid vote for the petitioner.
C-4	.. A ballot-paper with a cross as well as certain Urdu letters (سود)—which were subsequently struck out, against the name of the petitioner. Rejected by the returning officer as invalid.	Ditto.
C-5	.. A ballot-paper with a cross and another mark against the name of the petitioner. This was rejected by the returning officer as invalid.	Ditto.
C-6	.. A ballot-paper with a circle-mark against the name of petitioner. This was rejected by the returning officer as invalid.	Ditto.
C-7	.. A ballot-paper with a cross and a line against the name of the petitioner. This was rejected as invalid by returning officer.	Ditto.

LIST B.

Exhibit nos.	Description.	Claim or objection by respondent, Bahawal Bux.
B-1 to B-18 .	Ballot-papers with some faint and partial marks of thumb-impressions. These votes for petitioner were counted as valid by the returning officer.	These votes for the petitioner ought to be rejected as invalid, as the voter can be identified by the thumb-marks.
B-19 ..	A ballot-paper with a cross-mark against the name of the petitioner and a dot against the name of Mohd. Ashraff. This was counted as a valid vote for petitioner by the returning officer.	This vote should have been held invalid on account of the dot against the name of Mohd. Ashraff.
B-20 ..	A ballot-paper with a cross-mark against the name of the petitioner and faint pencil marks against the names of respondent and Mohd. Ashraff. This was counted as a valid vote for petitioner by the returning officer.	This should have been held invalid on account of the pencil marks.
D-1 ..	A ballot-paper with a cross against the name of the respondent. Along with the cross, there are some Urdu letters, which have been scored out. This was rejected as invalid by the returning officer.	The Urdu letters are not clear and are insufficient to identify the voter. Hence this should have been taken as a valid vote for the respondent.

CASE No. LXXV

Punjab S.E. Towns (M.U.) 1921

(PUNJAB LEGISLATIVE COUNCIL.)

NAWABZADA MUHAMMAD IRSHAD ALI KHAN .. *Petitioner,*

versus

KHAN BAHADUR MIR MUHAMMAD KHAN .. *Respondent.*

A scrutiny was allowed and several cases of personation were proved.

A candidate who comes to know of corrupt practices on the part of his agents, and takes no steps to disassociate himself therefrom, held to "connive".

On the recount after disallowing invalid votes petitioner declared elected.

To constitute a corrupt practice, e.g. personation corrupt motive is essential. Though fifteen votes were lost owing to personation, it was held that in only two cases were corrupt practices committed.

THE respondent in this case was returned by a majority of one vote only. The parties were the only two candidates for election in this constituency and polled respectively 198 and 197 votes. The election has been called in question by the petitioner on the grounds that there were numerous cases of personation among the voters of the town of Simla and that certain voting papers were wrongly held invalid by the returning officer. The petitioner has charged the respondent or his agent and friends with connivance at the corrupt practice of personation. He has further claimed a declaration under Punjab electoral rule 32 that he himself has been duly elected. Under rule 40 of the same rules the respondent made recriminatory charges against the petitioner, but little evidence was adduced in support of those charges. They have not been pressed in argument and we do not propose to refer to them further, except in so far as they concern two votes given in his favour, which the respondent alleged had been wrongly held invalid by the returning officer. We consider that the charges of corrupt practices brought by the respondent against the petitioner were improperly and recklessly made.

We shall first take the scrutiny necessitated by the petitioner's claim to the votes which he alleges were wrongly given to the respondent owing to personation. Of these, eight votes have been admitted by the respondent, at the time of argument, as lost to him. These are as follows :—

Muhammad Ibrahim, P.W. 3, voted in the name of his father, Muhammad Ismail, P.W. 2, voter no. 324 in electoral roll.

Qazi Ghisu, P.W. 5, voted in the name of his son, Muhammad Ali, R.W. 5, voter no. 320 in the electoral roll.

Abdul Sami, P.W. 7, voted in the name of one Abdul Sami, voter no. 168 in the electoral roll, whose age is put down as 30 and profession shop-keeping. Abdul Sami is a school-boy of 17 years of age and he therefore is not qualified as an elector.

Muhammad Sadiq, P.W. 10, son of Imam Bakhsh, voted in the name of Muhammad Sadiq, P.W. 9, son of Amir Din, voter no. 13 in the electoral roll, Simla Khurd.

Muhammad Yamin, P.W. 19, voted in the name of his father, Nasir Din, voter no. 358 in the electoral roll.

Miraj Din, P.W. 32, voted twice, his name having been entered twice by mistake in the electoral roll under nos. 269 and 338.

Ghulam Ahmad, P.W. 35, son of Mir Abdul Sattar, voted in the name of Ghulam Ahmad, son of Muhammad Ibrahim, voter no. 223 in the electoral roll.

Wali Ullah, P.W. 39, voted in the name of his uncle, Muhammad Bakhsh, P.W. 36, voter no. 267 in the electoral roll.

In addition to the above the petitioner claims as lost to respondent a number of other votes, the claim to which is disputed by the respondent. These will be dealt with seriatim.

Muhammad Azam, P.W. 1, a Government of India official, had a vote, but being at Delhi, did not vote, and some one else unknown voted in his name. He was voter no. 291 in the electoral roll. The respondent's plea that the parentage of this voter is not given in the electoral roll and that there might be some other Muhammad Azam, who was entitled to vote and who actually voted, is rejected. We have it in evidence without rebuttal that there is no other Muhammad Azam in Government service at Simla.

The name of Muhammad Qasim, son of Abdul Aziz, appears twice in the electoral roll under nos. 292 and 307, the only difference between the entries being that the profession in one case is put down as *Sahukara* and in the other as service. Muhammad Qasim, P.W. 22, states that he only voted once, and acknowledges his signature on the identity voucher belonging to voter no. 307, while he denies that on the identity voucher of voter no. 292. We have some doubt as to the truth of this denial. But apart from this, we are satisfied that there is here a lost vote. The witness states that there are other persons named Muhammad Qasim in Simla, but he does not know their parentage. In view of these facts we consider that the respondent, who is intimately acquainted with Simla, should have been able to produce the Muhammad Qasim, if any, who voted as voter no. 292. This he has not done, and without therefore deciding that P.W. 22 actually voted twice, we find the electoral roll nos. 292 and 307 relate to the same man; consequently the vote given in the name of voter no. 292 is lost.

Habib, P.W. 25, was not a voter, but voted in the name of some voter, probably no. 66 in the electoral roll. We believe the evidence to the effect that it was this witness who voted, and hold that the vote given is a lost one.

In the electoral roll under no. 279 appears the name of Muhammadi, no parentage, aged 40, profession shop-keeping. Under no. 296 is another Muhammadi, son of Salaru, aged 40, profession shop-keeping. Both voted. Muhammadi, P.W. 26, says that Salaru is his uncle, but has no son and that he, the witness, voted. He cannot identify the thumb-mark on the identity vouchers of either voter, and the Phillaur expert says that neither is of the same type as the witness's. We are inclined to think that the witness did not vote, and further are not disposed to think it proved that there is no other Muhammadi in Simla. The only point upon which we credit this witness is when he says that Salaru is his uncle and has no son. It is quite unlikely that he would speak falsely in this matter. We hold therefore that the witness is the voter entered

as no. 296 in the electoral roll, that he did not vote, but that some one else voted for him. One vote is thus lost.

At no. 365 in the electoral roll appears the name of Nur Bakhsh, son of Jhandu, profession shop-keeping. This voter appears as P.W. 29. He was away from Simla and never voted, and there is no other shop-keeper of his name and parentage. This man is illiterate, but the person who voted for him signed his name. This is a lost vote.

At no. 377 in the electoral roll appears the name of Hato. No parentage is given. His age is put down as 40 and profession shop-keeping. We are entirely convinced by the evidence that there is no such person as Hato, which is merely a form of address among Kashmiri coolies. How the entry came to be made is a mystery, which only the enumerator and his superiors would be able to solve. No solution has been advanced before us, and the electoral roll of Simla is, we find, so defective and incorrect in many particulars that it would be futile to follow up any one such defect or mistake in particular. One Ahmad Wain, P.W. 30, has come before us, but denies that he voted or that his name or *alias* is Hato: at the same time an affidavit, sworn by this man and dated 28th January, 1921 to the effect that his real name is Hato and that he voted, is put in as exhibit R-4. We are not concerned at the moment which statement is true. We need only say that, even if this man did vote in the name of Hato, he was voting in a fictitious name, that is to say, he applied for a voting paper in a name which was not his own. The vote is lost.

Under no. 174 of the electoral roll appears the name of Abdul Samad. No parentage is given, his age is 40 and profession shop-keeping. P.W. 38 says that he is this voter and that there is no other shop-keeper of this name in Simla. He did not vote, and denies his signature on the identity voucher. He is a respectable and a substantial man, and we believe his evidence. The vote is therefore lost.

Having found on the above scrutiny that fifteen votes are lost we have examined the ballot-papers and find that all these lost votes were cast for the respondent.

We have also looked at the voting papers held invalid by the returning officer, with reference to regulation 32 of Punjab Government notification no. 9, dated 31st July, 1920, and to the various English rulings

In the Commissioners' report, the 1st, 3rd, 6th and 9th symbols are marked in blue pencil, the 2nd, 7th and 8th in red, and the 4th and 5th partly in blue and partly in red.

on the subject. We are unable to agree with the returning officer that the voting papers marked thus X, X, ✕, ✕ or X are invalid for any of the reasons therein given. We hold them valid accordingly. On the other hand,

voting papers marked thus X ملور ^{XX} _{XC} زي +

or X مع الا are clearly invalid; one of them is marked with more than

one cross opposite the name of the candidate, while the others appear to contain attempts at signing the name of the voter, and bear marks by which the elector might certainly afterwards be identified.

The petitioner claims two more votes, which were disallowed him on the ground of absence of the punch-mark prescribed by regulation 25 under rule 13 of the Punjab electoral rules. One such voting paper is not punched at all and one has a defective punch-mark. In England want of an official mark may render a voting paper invalid under rule 36 of schedule I of the Ballot Act, but regulation 32 of Punjab Government notification no. 9, dated 31st July, 1920, does not provide that the lack of the punch-mark shall invalidate a voting paper in the Punjab, and both these votes must be allowed to the petitioner, leaving him a net gain of five votes on the spoiled voting papers. This, together with the 15 votes lost to the respondent, as explained above, leaves the respondent with 184 votes, and the petitioner with 202 votes.

The election of the returned candidate must, therefore, be declared void, and the petitioner is entitled to a declaration that he was duly elected ; we humbly advise His Excellency the Governor by this report, accordingly.

We now proceed under Punjab electoral rule 45 to record our findings on the question of the corrupt practices alleged to have been committed. As explained above, we find that the following persons have personated the real voters :—

Muhammad Ibrahim, Qazi Ghisu, Muhammad Sadiq, Muhammad Yamin, Miraj Din, Ghulam Ahmad, Wali Ullah, Habib.

The Indian law of personation (rule 2 of part II of schedule IV of the Punjab electoral rules) reproduces the English law as contained in section 24 of the Ballot Act and it is now completely established in England that “ unless there be corruption and a bad mind and intention in personating, it is not an offence ”. (*Stepney* case, 4 O’M. & H., 44.) We have no hesitation in accepting the same interpretation here and, in consequence, we are unable to hold that except in two cases, the persons named above, although they personated voters, committed a corrupt practice. Their votes, of course, are lost since they were not the true voters or entitled to vote and, although they have been exonerated from the charge of corrupt practice, it does not follow that any person who abetted their acts is not himself guilty of corrupt practice. Under the definition in rule 8 of part I of schedule IV abetment of any of the acts constituting personation is itself a corrupt practice and from this point of view, the guilt or innocence of the personator is immaterial.

The two exceptions are :—

(1) Muhammad Ibrahim, who voted for his father Muhammad Ismail and who admits he can write while his father is illiterate, but who thumb-marked his identity voucher instead of signing it. He says that he did

this at the instance of the respondent. This may be so, but even so, it should have warned him that he was doing something illegal ; and we convict him, on these facts, of a corrupt practice under rule 2 of part II, of schedule IV of the Punjab electoral rules.

(2) Miraj Din, a house proprietor in Simla, who voted twice for the respondent, passing as voters nos. 269 and 338 in the electoral roll, in one case signing his name on the identity voucher in English and in the other in vernacular, in the first case signing his correct name and the second making small alterations so as to bring the signature into accord with the name as entered the second time in the roll. Under no. 269 in that roll appears the name of Miraj-ud-din, son of Muhammad Sultan, aged 30, profession *Sahukara* ; under no. 338 the entry reads Miraz Din, son of Muhammad Sultan, aged 24, profession shop-keeping. It has been conclusively shown to us that Miraj Din must have entered the polling booth twice on separate occasions during the polling day and voted on one occasion as voter no. 269 and on the other as voter no. 338. When he denies that he went twice to the polling stations, he is guilty of a patent falsehood, for not only are his identity vouchers not consecutive, but they are taken from two different books, being no. 5 in Book no. 120/10 and no. 4 in Book no. 99/5. Further, it would have been impossible for him to have obtained two identity vouchers and two voting papers for this constituency at the same time and have run the gauntlet of all the polling station officials while so doing. If it be taken that both entries in the electoral roll refer to the same person, then on these facts his action is not susceptible of explanation on the hypothesis that he was under the *bona fide* impression that he had two votes even if it could be assumed that a voter of this standing and education was unaware that no voter could have two votes for the same constituency. If it be taken that the entries relate to two different persons, then it is clear that this man personated one of them. The definitions of personation in rule 2 of part II of schedule IV of the electoral rules make it a corrupt practice for any one to apply for a voting paper in the name of any other person, or for any one who has voted once at an election to apply for a voting paper in his own name at the same election. Miraj Din's action, which the method he adopted shows was not *bona fide*—thus amounts to personation under one or other of these definitions. The petitioner only claims one vote as bad and we have not considered the question whether both should be held bad or not. One vote is lost to the respondent.

We report Miraj Din also as guilty of personation, which is a corrupt practice under rule 2 of part II of schedule IV of the Punjab electoral rules. In the case of Ahmad Wain, there is some doubt whether he voted, but he actually perjured himself on this point and we are sending him to the Magistrate under section 476, Criminal Procedure Code ; the

conduct of this person may be therefore left to be dealt with by the Magistrate.

We wish here to animadvert on the conduct of Abdul Aziz, municipal overseer, inducing his son, who was admittedly not qualified as an elector, to vote. This Abdul Aziz was canvassing on behalf of the respondent and was actively engaged on his behalf on the polling day. He is a man of some education and must certainly have known that his son was not qualified to vote. There is some doubt, however, whether the name entered in the electoral roll does not really relate to this Abdul Sami, though with a wrong age given, whether deliberately or otherwise. We are unable therefore to hold either that the conduct of Abdul Sami falls within the definition of personation as given in rule 2 of part II of schedule IV of the Punjab electoral rules or that Abdul Aziz committed any offence under rule 3 of part I of the same schedule. We wish, however, to express our strong condemnation of the action of Abdul Aziz, whose son was doubtless acting under the influence of his father.

Although there is some evidence to connect Ali Naqi, sanitary inspector of Simla municipality, who also canvassed for respondent, with the personation of Muhammad Sadiq, son of Amir Din, by Muhammad Sadiq, son of Imam Bakhsh, yet we are unable to find that there is sufficient proof to justify a finding of the corrupt practice in question, that he was guilty of abetment.

It remains to consider the question how far the corrupt practices mentioned above were committed either directly by, or with the connivance of the respondent himself. We have carefully examined the evidence which is both direct and circumstantial against him. In the way of direct evidence, we have the statements of Muhammad Ibrahim, P.W. 3, Habib, P.W. 25 and Ghulam Ahmad, P.W. 35, and if these statements stood alone, we should have had much hesitation in acting on them. We are unable, however, to overlook a number of circumstances which taken together and in conjunction with the oral evidence, lead us to the conclusion that, even if he did not directly procure or abet the personation of any one voter, yet such personation was with his connivance. In the first place, the respondent is an old resident of Simla and a vice-president of the municipality, and must have been personally acquainted with many of the voters. Of the total number of 150 votes cast in Simla Kalan, all but four were in his favour. There are proved 15 cases of personation and we have reason strongly to suspect five others. This gives a very large percentage of personated votes, and as the respondent admits his presence at the polling station for about four hours on the day, it is difficult to see how some of them did not occur in his presence, as the witnesses allege. Of the three votes cast in Simla Khurd, one has been held invalid for personation in which Ali Naqi—his agent and his subordinate in the municipality—is said to have had a part.

Moreover, his other subordinate and agent, Abdul Aziz, who admittedly canvassed for him, was active at the polling station of Simla Kalan and the conduct of this man has already been adversely commented on. It is clear that some person or persons were engaged in procuring widespread personation of voters, a number of whom, being small shop-keepers, would naturally be subject to the influence of municipal officials. It is impossible to believe that all this campaign of personation in the interests of the respondent was being conducted without his knowledge and complicity. If, therefore, he came to know at the time, as we consider he must have done, and took no steps to disassociate himself from the corrupt practices of his agents, he must be held to have connived at these corrupt practices.

We report accordingly that Khan Bahadur Mir Muhammad Khan is guilty of corrupt practices as defined in section 3 of part I of schedule IV of the Punjab electoral rules. We desire to add a few observations in possible explanation of the conduct of the respondent. This was the first election held under new and somewhat complicated rules and regulations. It is possible that the respondent placed himself too much in the hands of over-zealous and unscrupulous agents, allowing them to conduct this election as if it were a municipal election—in which such practices, as have been prevailed, are not unknown—without realizing the serious consequences involved by his action or inaction. The respondent's close connection with Simla would have led him to expect a heavy poll in his favour, but owing to the election being held in the winter, many voters, such as Government officials, shop-keepers and others, had, as is usual, left Simla for the plains. He would thus be deprived of many otherwise certain votes unless by some means or other those votes could be cast. There is evidence to show that in one case, that of Muhammad Sadiq, the real voter was willing to vote for him and in others, as where a son personates his father or a father personates his son, the obvious inference is that the real voters would have voted for him, and he and his agents might not have regarded the matter as very serious.

The respondent was regarded as a Government man by the non-co-operators, who were strenuously opposed to him and probably caused many abstentions, although it would be absurd to suppose, as suggested by the respondent, that they actually put forward persons to vote for him in order subsequently to involve him in the charges now made against him.

It will be for Government to decide whether the circumstances are such that it should exercise the power vested in it under the proviso to rule 5(4) of the Punjab electoral rules. We are unable ourselves, from the judicial point of view, to make a recommendation to this effect.

The respondent must bear all the costs of the petitioner which we assess at Rs. 2,500.

CASE No. LXXVI
Purnea (N.-M.R.) 1921

(BIHAR AND ORISSA LEGISLATIVE COUNCIL.)

.

BABU SASIBHUSHAN KONAR	} <i>Petitioners,</i>
RAI BAHADUR PRITHI CHAND LAL CHAUDHRI	

versus

BABU RAM PRASHAD	<i>Respondent.</i>
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An election agent need not be an elector in the constituency.

The right of a voter cannot be challenged on any other ground than that of personal disability or want of status.

Except as to cases coming within these grounds the electoral roll is binding, not only upon the returning officer, but also upon an Election Court. The returning officer can take evidence summarily as to identity, and his decision is open to reversal by an Election Court.

IN this case the returning officer has held that the candidate was not duly nominated because he had appointed as his election agent a person who was disqualified from acting as such by reason of his not being an elector of the constituency.

In our opinion the returning officer was clearly wrong. Under rule 15 of the election rules only the following persons are debarred from acting as election agents: (1) persons found guilty of certain offences or reported by election Commissioners as guilty of certain corrupt practices, and (2) persons, who having previously been candidates or election agents at an election to a legislative body constituted under the Act, have been found guilty of failure to lodge returns or of lodging incorrect returns.

The rules do not require that an election agent shall himself be eligible for election as a member, much less that he should be an elector of the constituency.

The petition must therefore be allowed; and we must find that the returned candidate has not been duly elected. We assess the costs of the hearing at Rs. 100.

This finding would under ordinary circumstances make it unnecessary to consider the petition of the other defeated candidate, Rai Bahadur Prithi Chand Lal Chaudhri, but as a somewhat important point has been raised by him we will give a decision upon it.

This candidate's seconder subscribed himself as "Modo Sahu, son of Munni Lal Sahu, elector of the Kasba Union Committee, Circle no. XI". In the register of electors there is an elector of the name of Modo Sahu, the son of Munni Sahu but there is no Modo Sahu who is the son of Munni Lal Sahu. At the scrutiny of the nomination papers neither the candidate nor his representative, nor the proposer, nor the seconder put in an appearance and the returning officer held that it had not been shown that the seconder was an elector of the constituency. He accordingly of his own motion rejected the nomination paper.

Now the regulations framed under rule 13 of the election rules provide for the identification of voters. They do not provide expressly for the identification of proposers and seconders, but they seem to imply that the returning officer must satisfy himself in the manner he considers most suitable that the nomination is in accordance with law. The nomination form does not require either a proposer or a seconder to subscribe the name of his father, but as the electoral roll describes electors by their fathers' names, it would seem to be the returning officer's duty to ascertain the fathers' names of the proposer and seconder unless there be other means of identification available.

The provisions of rule 42 seem to show that evidence can be given at the hearing of an election petition against the returning officer's

decision as to the identity of a voter, but it is not so clear whether the same rule should be followed in the matter of his decision as to the identity of proposers and seconders.

Now an election is void when there has been *inter alia* any material irregularity in regard to a nomination paper or any non-compliance with the rules which has affected the result. A wrong rejection of a nomination paper on the ground that the seconder is not an elector is a non-compliance with the rules ; and therefore in our opinion evidence can be given in an election court to attack the returning officer's finding.

In this case Modo Sahu has given evidence before us which remains unchallenged and establishes that he is the person who has been entered in the register as Modo Sahu, the son of Munni Sahu. It would seem that under the election rules with which we are concerned, as in England, the right of a voter, if on the register, to vote, propose or second cannot be challenged on any ground other than that of personal disability or want of status ; and that except as to cases coming within these grounds the register is conclusive not only upon the returning officer but also upon an election court or scrutiny. But where there is a doubt, evidence of identity may be given before the returning officer (whose enquiry must be summary) as well as before the court.

In England the returning officer's decision dismissing an objection to the validity of a nomination on the ground that the seconder was not a registered voter would seem to be final under rule 13 of the rules framed under the Ballot Act, 1872, but his decision allowing an objection is subject to reversal on petition questioning the election or return. His decision on the right of an elector to vote is always open to reversal.

In the rules applicable to the case before us the returning officer's decision does not seem to enjoy even the limited protection given in England and in our opinion it is open to the seconder in this case to give evidence that he is a registered elector. On the evidence given by him we are satisfied that he is the same person as Modo Sahu, the son of Munni Sahu.

In *Moorhouse vs. Linney*, 15 Q.B.D., 273, it was held that an assenter who had subscribed a nomination paper as Charles Arthur Burman, which was his real name, was not competent to urge that he had been erroneously entered in the register as Charles Burman ; and the returning officer's decision rejecting the nomination paper was upheld.

That case was decided on its special facts. Probably the elector's father's name was not given and there was no means of identifying him with the assenter. On the other hand the courts have held in England that a vote or nomination is valid when a voter recorded as P.S. and generally known as P.S. votes as J.P.S. (*Exeter*, 6 O'Malley and Harcastle, page 235 per Channell, J.) ; or where a nominator subscribes his surname in full but only the initials of his Christian names (*Bowden vs. Besley*, 21

Q.B.D., 309); or where a nominator signs as Henry D. Davenport, though entered in the roll as Henry D. Evereux Davenport (*Harding vs. Cornwall*, 60 L.T., 959).

Applying the principle of these cases it seems to us that the returning officer's decision was erroneous and that the objection must succeed.

We are not unmindful of the fact that in India the use of double names and aliases sanctioned often by religion and custom is far more widely prevalent than in England, and that the investigation into differences between the electoral roll and the statements of voters and nominators may prove no light task for election courts; but the framers of the rules appear to have advisedly refrained from attaching finality to the electoral roll, and we presume that it was the intention of the Legislature in India to follow the English rule as to the correction of a misnomer.

The election must therefore be declared void. We assess the costs of the hearing at Rs. 100.

We have to observe that services of notice upon the respondent by registered post in both cases have been duly proved. He has failed to appear but we have received a petition and a telegram purporting to have been sent by him in which it is stated that he does not desire to oppose the petitions. In the absence of any proof that these communications come from him we are unable to take them into consideration either in making our award as to costs, or for the purpose of issuing notices under rule 39. Having regard to the course which the respondent has pursued there does not seem to be any reason why he should not pay the costs of each petitioner.

CASE No. LXXVII

Rangoon East, 1932

(BURMA LEGISLATIVE COUNCIL.)

U THET HNAN	..	•	∴	..	} <i>Petitioners,</i>
U SAING	..	•	∴	..	
U MAUNG MAUNG GYI	..		∴	..	
SAW TAIK LEONG	..		∴	..	

versus

U BA PE	..	∴	∴	} <i>Respondents.</i>
U MAUNG MAUNG OHN GHINE	..	∴	∴	

Where a summary inquiry can't ascertain facts as to identity such should be held by the returning officer. To reject a nomination paper without making such enquiry is improper.

THE hearing of this case has lasted much longer than its merits deserved. The issue involved is a simple one, and we have no doubt that the petition ought to be granted, and that the election should be declared to be void. We propose to report to the Governor in that sense.

The issue which falls for determination in this petition is whether the result of the election has been materially affected by the improper refusal of two nomination papers,—those presented by U Maung Maung Gyi and U Thet Hnan. Both these nomination papers were rejected by the returning officer at the scrutiny of nominations, upon the ground that neither candidate was identical with the person whose electoral number is given in the nomination paper as the number of the candidate. In U Maung Maung Gyi's nomination paper the address of the candidate is given as no. 53/55, Barr street, Rangoon, and "the number on the electoral roll" as 670.

There is no provision in the rules or regulations framed in that behalf prescribing that the candidate is required to state the name of the constituency on the electoral roll of which his name is registered. It may be that it is advisable that a candidate should be required to do so. But that is a question of policy with which the court is not concerned. In order that there should be no doubt, however, as to the constituency upon the electoral roll of which his name is borne U Maung Maung Gyi attached to his nomination paper a certified entry from the electoral roll of the West Rangoon General Urban constituency, in which it is stated *inter alia* in entry 670 that U Maung Maung Gyi is an elector, and that his address is 83, Cheape road. We are disposed to think that a nomination paper should be a self-contained document. It is a document extracts from which are to be affixed in a public place so that the general public may be aware of its contents. If at the scrutiny any question should arise as to the constituency on the electoral roll of which the candidate's name is borne, it is provided in regulation 23 (2) (a) that "the production of any certified copy of an entry made in the electoral roll of any constituency shall be conclusive evidence of the right of any elector named in that entry to stand for election". If any question, therefore, were to arise in connection with the nomination of U Maung Maung Gyi as to the constituency on the electoral roll of which his name is borne he would have been at liberty to produce, and justified in producing, the document which he attached to his nomination paper. U Maung Maung Gyi, however, did not wait until the scrutiny in order to inform those concerned with the regularity of the nomination of the name of the constituency on the electoral roll of which he was registered as an elector.

When the scrutiny took place the returning officer rejected the nomination of U Maung Maung Gyi for the following reason :—

“ In the roll the address of U Maung Maung Gyi is given as 83, Cheape road, whereas in the nomination paper his address is given as no. 53/55, Barr street, Rangoon. The candidate, under the above circumstances, is not identical with the person whose electoral number is given in the nomination paper as the number of the candidate.” In rejecting the nomination of U Maung Maung Gyi, U E Cho, the returning officer, proceeded under regulation 23 (1) (4), by which it is provided that the returning officer may “ after such summary enquiry, if any, as he thinks necessary, refuse any nomination on any of the following grounds :—

that the candidate or any proposer or seconder is not identical with the person whose electoral number is given in the nomination paper as the number of such candidate, proposer or seconder, as the case may be.”

Now, the question is whether the refusal of the nomination was improper. In our opinion there was no justification in the circumstances for the refusal of the nomination of U Maung Maung Gyi. It is not disputed that U Maung Maung Gyi's address is 53/55, Barr street, Rangoon, and U Maung Maung Gyi in his evidence before us has stated that he used to live at 83, Cheape road, from August, 1930 till June, 1931, but that since the end of June, 1931 he has changed his residential address more than once. In our opinion the returning officer had no reason to suppose that U Maung Maung Gyi, the candidate whose nomination paper he was scrutinizing, was not identical with the U Maung Maung Gyi whose name was set out in entry 670 of the electoral roll of the West Rangoon General Urban constituency. Nevertheless, the returning officer thought fit to reject this nomination paper merely because the address 83, Cheape road, was not the same as the address 53/55, Barr street. If he had asked one simple question of the candidate the position would have been made quite clear. If he had asked the candidate whether he had ever lived at 83, Cheape road, the candidate would have told him, what is not a matter of dispute, that he used to live at Cheape road, but that he had now changed his address. Why the returning officer did not ask that question of U Maung Maung Gyi we find it difficult to understand. In our opinion there was no ground which would justify any reasonable person in supposing that U Maung Maung Gyi, the candidate for the East Rangoon General Urban constituency, was not identical with the U Maung Gyi whose number upon the electoral roll of the West Rangoon General Urban constituency is 670. In our opinion the refusal of U Maung Maung Gyi's nomination was improper, and it is not contended, and cannot be pretended, that the effect of the improper refusal of this nomination did not materially affect the result of the election. Our finding that the refusal of the nomination of U Maung Maung Gyi was improper is sufficient to dispose of this petition in favour

of the petitioners, and it is a ground for declaring that the election of U Ba Pe and U Maung Maung Ohn Ghine, the returned candidates, is void.

The other ground upon which the petition is based is the alleged improper refusal of the nomination of U Thit Hnan. In respect of that candidate also the returning officer refused the nomination under regulation 23 (1) (iv). The returning officer reported : " The candidate is personally known to me, his actual and real name is U Thet Hnan. The candidate is not identical with the person whose electoral number is given in the nomination paper as the number of the candidate." As the election of U Ba Pe and U Maung Maung Ohn Ghine must be declared to be void having regard to the improper refusal of the nomination of U Maung Maung Gyi, we are not disposed to consider whether any grounds exist, other than those upon which the refusal of U Thit Hnan's nomination was rejected by the returning officer, which would justify the rejection of the nomination paper of U Thet Hnan. We are of opinion, however, that the refusal of the nomination of U Thit Hnan upon the ground upon which the refusal was based was improper. The candidate was well-known personally to the returning officer, and the returning officer refused his nomination upon the ground that the candidate was not identical with the person whose electoral number was given, in the nomination paper as the number of such candidate. It may be taken for the purpose in hand that the name by which the candidate was usually known was U Thet Hnan. But there can be no doubt that he was sometimes called U Thit Hnan. Certain tax receipts were adduced in evidence at the hearing before us in which the candidate is sometimes called Thet Hnan, sometimes Thit Hnan, and it appears that in entry 1744 in the electoral roll of the East Rangoon General Urban constituency the name of the elector is set out as Ko Thit Hnan of 459, Lower Pazoon-daung road. The question before the returning officer was whether the candidate, who was generally known as Ko Thet Hnan, but who was sometimes addressed as Ko Thit Hnan, was identical with the Ko Thit Hnan whose name appeared in entry 1744 on the electoral roll of the East Rangoon General Urban constituency.

In the circumstances in which the scrutiny took place and the nomination was rejected, the question is was the returning officer justified in coming to the conclusion that the candidate was not that person ? In our opinion he was not. We accept the evidence of U Thet Hnan where he stated " I told the returning officer I was the person whose name appeared on the electoral roll. I said if any other person of that name was produced as being the U Thit Hnan whose name appeared in entry 1744 I was prepared to face a prosecution for impersonation". That he did state at the enquiry that he was prepared to face a prosecution for impersonation in certain events is admitted by the returning officer himself, and we think that upon this matter the evidence of

U Thet Hnan is to be accepted. Having regard to the positive asseveration by U Thet Hnan of his identity with U Thit Hnan whose name appeared on the electoral roll, we think in the circumstances that without making further enquiry into the matter the returning officer was not justified in rejecting the nomination. It is not without significance that at the hearing of the petition not only were witnesses called who stated that no other person of the name of U Thit Hnan resided in Lower Pazoondaung road, but the respondents have not adduced any evidence before us tending to show that the statement made by U Thet Hnan at the scrutiny was not true.

In our opinion the refusal of the nomination of U Thet Hnan upon the ground upon which it was based by the returning officer was improper, and cannot be supported.

The result is that we shall report to the Governor that the returned candidates U Ba Pe and U Maung Maung Ohn Ghine have not been duly elected. Both U Ba Pe and U Maung Maung Ohn Ghine have filed written objections to the petition, and have appeared in support of the objections at the hearing. We think that an order for costs, 20 gold mohurs, should be made against both the respondents.

CASE No. LXXVIII

Rangoon West (G.U.) 1926

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U KYAW ZAN *Petitioner,*

versus

U THEIN MAUNG *Respondent.*

Solicitation of voters may not amount to undue influence though it may justify the removal of the person soliciting votes from the polling booth.

Mere giving of tea in accordance with the prevailing custom is not corrupt treating.

Absence of definite particulars precludes petitioner from pressing a charge of bribery.

Personation proved. Claim for seat refused and election avoided.

At the election to the Burma Legislative Council for the two seats in the Urban General constituency, Rangoon West, held on the 17th day of November, 1925, the result of the polling was as follows :—

			<i>Votes.</i>
Kheng Beng Chong	..	..	3,520
U Thein Maung	..	..	2,923
U Kyaw Zan	..	..	2,203
U Ba Dun	..	..	1,676
U Tun Baw	..	..	751
U Nyö	..	.. •	235

Kheng Beng Chong and U Thein Maung were declared elected.

On the 22nd December, 1925 a petition against both the successful candidates was presented by U Kyaw Zan to His Excellency the Governor alleging sundry malpractices voiding their election and praying to be himself declared duly elected. Before the hearing of evidence U Kyaw Zan withdrew his petition against Kheng Beng Chong and abandoned certain of his charges against U Thein Maung, confining himself to protesting (1) that Mrs. Thein Maung had been guilty of intimidating voters at the Pongyi street polling booth ; (2) that U Thein Maung had employed agents to get persons to vote for him in the names of dead persons or persons who although entitled to vote had not voted ; (3) that his agents had paid money to voters to vote for U Thein Maung ; (4) that U Thein Maung had caused his agent at Kanoungto to treat voters with tea on the day of the election.

The petitioner in his evidence complains that Mrs. Thein Maung, who was acting as agent on behalf of her husband at the booth, stood outside the Hpongyl street polling booth and called out to voters in insulting tones, her object being to create a disturbance ; at the entrance to the balloting enclosure she caught hold of sundry voters asking who they were and what right they had to be there , she addressed others saying that she was Thein Maung's wife, that she was *shikoing* them, and that they should vote for her husband ; she accompanied some of the voters into the balloting enclosures and attempted to eject the presiding officer's orderly who was on duty there, complaining that he was trying to influence voters ; as she was creating a disturbance, the orderly practically dragged her out of the balloting enclosure. U Kyaw Zan hints that she may have been instrumental in procuring personation, as some of his lady supporters who shortly afterwards endeavoured to vote were informed that they had already voted. His agent Po Ya Win merely says that she stood at the entrance of the polling booth and requested voters to vote for her husband and accompanied as far as the entrance to the screened enclosure three ladies who went to vote. The

presiding officer U Maung Gale states that Mrs. Thein Maung objected to the presence of the orderly near the entrance to the balloting room ; he therefore instructed his orderly to go away ; Mrs. Thein Maung in spite of the protests of U Kyaw Zan and his own instructions persisted in standing near the entrance to the balloting enclosure telling people to vote for her husband ; U Maung Gale was reluctant because of her sex to order Mrs. Thein Maung out of the polling enclosure ; finally U Kyaw Zan handed him a written objection which unfortunately has been mislaid. Myo Chun who was assisting the presiding officer mentions that Mrs. Thein Maung was rather obstreperous, and that she stood in the neighbourhood of the polling enclosure ; in cross-examination he volunteers the information that her companion pulled some people. Mr. Choon Fong who was Beng Chong's election agent heard Mrs. Thein Maung shout that somebody was inside the booth and heard Mr. Kyaw Zan complain about the conduct of Mrs. Thein Maung ; Mrs. Thein Maung pulled the presiding officer's orderly and in spite of remonstrance continued to stand at the balloting enclosure talking to the voters as they went in pointing out that they should vote for her husband. Mrs. Thein Maung denies the imputations made against her and explains that she found it necessary to protest from time to time against interference with voters by Kyaw Zan. Mrs. Thein Maung does not appear to have molested the voters in any way, her violence, if any, being directed towards the orderly of the presiding officer to whose presence at the entrance of the polling enclosure she objected. We do not find it established that she entered the polling enclosure itself, nor can we hold that the mere soliciting of voters is undue influence. We are of opinion that although Mrs. Thein Maung did create some disturbance that would have justified the presiding officer in turning her out of the polling booth, her action does not amount to undue influence defined in part 1-2 of schedule IV referring to corrupt practices.

It is clear that Po Chit, alleged to be an agent of the respondent, did give tea to voters in his house early in the day of the election. The voters to whom he gave tea were in many cases persons of substance whose votes were not likely to be swayed by hospitality of this nature. In view of the prevailing custom of giving tea wherever visitors are gathered together, we consider that Po Chit was only carrying out what he considered to be the prescribed etiquette of the country and that the mere giving of tea cannot in the particular circumstances be regarded as corrupt treating. We cannot regard seriously the evidence that U Thein Maung himself was seen supplying Po Chit with tea and biscuits, a couple of days before the election.

As regards the allegations of payments by U Ye Ge, all that is established is that U Thein Maung handed over Rs. 50 to U Ye Ge, a member of the committee of the Pongyi Street Thamaga Association, one of the main functions of which was the public feeding of Hpongyis, with

instructions that the association should entertain Hpongyis to that amount with rice gruel. Rs. 16 remain unexpended and some months after the election when the question arose as to what should be done with this balance Mr. Thein Maung said that he preferred not to take the money back as it was originally intended for charity, and made the money over to the association.

U Kyaw Zan argues that the contribution of Rs. 16 to the association, some members at least of which had votes, is included in the charge of the payments to voters alleged in the particulars furnished by him. It is objected that it is nothing of the kind and that the petitioner (although given ample opportunity) by not disclosing what his allegations against Ye Ge really were is not entitled to go into this question. With this contention we concur. Mr. Thein Maung admits that he paid to the Hpongyi Street Association Rs. 50 for the purpose of supplying rice gruel to Hpongyis, his motive being to gain religious merit, which might bring him luck in the coming election. It is argued that even supposing that the treating of the Hpongyis is held to be a corrupt practice we are not entitled to take it into account as it was not alleged in the charges originally framed. While agreeing that our functions are judicial and not inquisitorial and that we are not entitled to go into evidence on charges which were not contained (at least by reasonable implication) in the charges originally framed, we have no hesitation in saying that where a party himself admits that he has been guilty of what is *prima facie* a corrupt practice we are bound in the absence of a satisfactory explanation to take cognizance under section 44(1) of the Burma electoral rules of that admission and to report accordingly. Where, however, the practice is susceptible of an innocent interpretation the Commissioners have no warrant for calling evidence to prove the contrary. In the present case U Thein Maung has explained that he desired to gain merit by entertaining Hpongyis. In view of the petty nature of the entertainment, we consider that this explanation may be accepted although we prove the dictum of Bowen, J. (quoted on page 432 of Rogers on Elections) that "charity at election times ought to be kept by politicians in the background" and we consider as highly injudicious Mr. Thein Maung's entertainment of Hpongyis in a district with which he had no previous connection,* and in which he intended to conduct an election campaign.

In seven cases there is not a shadow of doubt that there has been personation. Po U's widow states that her husband has been dead ten years. U Po Thu, ward-headman testifies that Po Chit is dead, that Po Dwe and Ma Kin have moved to another quarter, that Ba Than is mentally deranged and his whereabouts unknown. Na Thin's widow proves his death, Maung Chin Bo's son states that his father is twenty years dead, while Maung Tun Sein who has left the constituency denies that he went

to the poll. As the truthfulness of these witnesses has been in no way impugned we accept their statements. The electoral rolls in charge of the tellers and the token clerks' tally list show each of the above-mentioned voters as having recorded his or her votes.

Three witnesses came forward to admit that they personated Chin Bon, Tun Sein and Ba Than at the instigation of Saya Hla Ma Ngwe Bu, Maung Po Yin, Maung Po Yi, Maung Thein Pe admit that they voted for Ma Kin. Po Chit, Ba Than and Po Dwe, being persuaded to do so by Saya Khin. Although there are indications that there has been some embroidery of their story the main features of the evidence of these witnesses have not been seriously shaken in cross-examination.

The first group of personators allege that they were instructed by Saya Hla to endeavour to get tokens which they were to bring back to Saya Hla who in turn handed them over to Saw Nyun, the election agent of Thein Maung—who had wisely concluded that the best way of ensuring that purchased votes would be cast for his candidate was to put the tokens in the ballot-box himself. Saya Hla is a schoolmaster in charge of an unrecognized school. He explains that he worked hard for U Thein Maung—who was chairman of the education board—in return for a promise that his school would be recognized. It was only after the election when he had failed to obtain the desired official recognition, that he turned against U Thein feeling that he had been tricked. Notwithstanding U Thein Maung's repudiation of any promise on his part and his efforts to minimise the rôle played by Saya Hla in assisting him in the election, we are convinced that Sya Hla worked for Thein Maung with his consent and knowledge and that Thein Maung had held out hopes of recognition to Saya Hla in return for loyal co-operation at the election. The evidence of U Po Thein, vice-president of the Dana Presaga association which admittedly worked in Thein Maung's interest is conclusive on the point, while a letter written to Maung Min Din by U Thein Maung in which he stated that on the advice of Saya Hla he was approaching U Min Din to ask for motor boats to assist him in the election shows that Saya Hla, six days before the election, was in direct communication with U Thein Maung and assisting him on in his campaign. Saya Hla, subsequent to the election must have been aggrieved by some action or fancied action on the part of U Thein Maung to have acted as he has done. It may be added that the promise by U Thein Maung, as it was not for the purpose of influencing the vote of Saya Hla, was in no way a corrupt practice. Saya Hla says that at the instigation of Saw Nyun he bought the three personators, namely, Maung Tha Maung, Maung Win and Maung Sein. It may be argued that Saya Hla's word is not to be trusted in view of his admissions of pique. The very candour of these admissions is in his favour. Moreover, it must be considered that to go into the witness box and admit to behaviour which the man

in the street regards indulgently as smart practice involving little moral turpitude is a very different matter from committing perjury. It is doubtful whether the Dana Presaga association which is interested in the welfare of his school would view with any great favour the spectacle of Saya Hla for swearing himself to ruin U Thein Maung. It is significant, moreover, that no counter allegations of personation have been brought against U Kyaw Zan. Had it been established that personation was taking place on a large scale on his side it might be permissible to assume that possibly the personations now established were on his behalf. Maung Saw Nyun's eagerness to repudiate what is obviously his handwriting on the copy of the electoral roll that he gave Saya Hla, and on which Saya Hla himself marked the dead and absent voters shows that the relations of Saw Nyun with Saya Hla were not of an innocent nature.

The other group of personators allege that they were asked to personate by Saya Khin, who paid them for their trouble. Saya Khin has gone into the witness box to rebut the evidence, but his demeanour has if anything strengthened it as—although admittedly an agent of U Thein Maung—he professes to have taken no active part whatsoever in the election. Were he to be believed one might well ask what advantage U Thein Maung expected to gain by enrolling him as an agent. We have been most unfavourably impressed with his evidence and with that of Saya Nyun, U Thein Maung's election agent, who fenced steadily during his cross-examination and showed a manifold lack of candour throughout the whole of his evidence. The credibility of Saya Khin is not improved by the record in the polling register that two votes were cast in the name of his wife Ma Aye, one for her property in Kyaiklat street, the other for her Pantanaw street property; his assistant U Chit Po who is supposed to have prepared the lists for that quarter makes the astounding statement that he does not know why Ma Aye's name appears in the Kyaiklat street roll, although he must be well aware that she owns property there. The general tenor of the evidence of the majority of the witnesses produced for U Thein Maung is surprisingly unconvincing.

The evidence, as a whole, establishes that Saya Hla at the instance of Saw Nyun, election agent of U Thein Maung, paid money to Maung Tha, Maung Win and Maung Sein who personated Chun Bon, Tan Sein and Ba Thin and that Saya Khin paid money to Ma Ngwe Bu, Maung Po Yin, Maung Po Yi and Maung Thein Pe to personate Ma Kin, Pio Chaing, Ba Than and Po Dwe. We do not, however, consider it proved that U Thein Maung—who apart from his denial of his promises to Saya Hla has given his evidence with candour—had any knowledge of the purchase of votes. He is therefore not liable to disqualification under rule 5.

The English principle is that the interests of the electors are paramount and that where a successful candidate has been subsequently declared disqualified, unless his electors had reason to know that the disqualification existed when he presented himself for election, their votes cannot be regarded as wholly wasted. Unless, therefore, a petitioner can establish that had it not been for the delinquencies of the unseated respondent or his agents the petitioner was morally certain of election the constituency is entitled to another opportunity of exercising its choice of a representative. There is nothing in our electoral rules to contradict this principle which appears to us to be at the base of the very concept of representation, and this will govern our decision.¹

In the present case U Kyaw Zan who was over 700 votes behind U Thein Maung and less than 600 votes ahead of U Ba Dun has produced no evidence that there was even a high probability of his election.

Although, therefore, U Thein Maung must as the result of the behaviour of his agents be unseated under rule 44 (1) (b) U Kyaw Zan is not entitled to claim the seat.

¹ See section 3 (2) of part III of the Government of Burma (Corrupt Practices and Election Petitions) Order, 1936.

CASE No. LXXIX
Rawalpindi and Lahore Divisions 1924

(PUNJAB LEGISLATIVE COUNCIL.)

LABH SINGH *Petitioner,*

versus

NIRANJAN DASS *Respondent.*

There is no objection to a petitioner filing a second petition by way of precaution.

Unless petitioner claims the seat he cannot challenge the return of election expenses made by the respondent before the election court.

An election court can enquire into an allegation of disqualification of a voter or candidate. In this case evidence was allowed that the candidate for a non-Muhammadan constituency was a Sikh.

Definition of Sikh discussed.

PETITIONER, Labh Singh, respondent, Niranjan Dass and two other persons were candidates for the "Rawalpindi Division and Lahore Division (North) non-Muhammadian" constituency at the last election for the Punjab Legislative Council. The returning officer held the nomination papers of all the candidates excepting respondent, Niranjan Dass, to be invalid, with the result that the respondent was declared duly elected. Petitioner contends that the returning officer was not justified in holding his nomination papers (petitioner had presented five in all) to be invalid, and prays for a declaration that the election of the respondent was null and void.

Respondent, Niranjan Dass, pleaded that the grounds on which the returning officer rejected the petitioner's nomination papers were sound, that there were other grounds as well for holding the said nomination papers to be invalid, and that the declaration accompanying the nomination papers was invalid for want of stamp. Respondent also raised a further plea that the petitioner was a "Sikh" and as such was not entitled at all to stand as a candidate for a non-Muhammadian constituency, according to rule 6(b) of the Punjab electoral rules.

Certain preliminary issues were disposed of by an order, dated 27th March, 1924, a copy of which forms an annexure to this report. The remaining issues, which now require decision, are as follows:—

The Commissioners held that a nomination paper could "be properly refused only if there was any *prima facie* good ground for doubt as to identity. . . . The returning officer has been given powers to make a summary inquiry, and if he really thought that there was any room for doubt as to identity in the present case, he would have been, we think, well advised to do so before refusing the nomination paper. In the present case, the only difference consists of the prefix 'Mr.' or 'Sardar', before the names".

They further pointed out that "the right to vote of a person who is enrolled as a voter cannot be questioned in an election court except on the ground of disability".

The last issue raised a point of some interest and importance. Respondent's contention was that the petitioner is a "Sikh" and is, therefore, not entitled to stand as a candidate for a "non-Muhammadian" constituency (*vide* rule 6(b) of the Punjab electoral rules). The petitioner had raised a preliminary objection that as his name was on the electoral roll of the constituency in question, the respondent had no right to raise this point. An issue was framed on the point and was decided in favour of the respondent by order, dated 27th March, 1924 (*vide* annexure to this report). "The question whether petitioner is or is not a Sikh has, therefore, to be decided by us on its merits."

“According to rule 6(b) referred to above, only a ‘non-Muhammadan’ is entitled to stand for a non-Muhammadan constituency. The term ‘non-Muhammadan’ has been used in a peculiar sense and includes all persons who are neither Muhammadans nor Sikhs. The contention of the respondent is that the petitioner is a Sikh and, therefore, not a ‘non-Muhammadan’. We have, therefore, to determine who is to be considered a ‘Sikh’ for the purposes of rule 6(b).

“Unfortunately, the electoral rules themselves do not give any clear definition of the word ‘Sikh’ for the purposes of *this* rule. The word ‘Sikh’ has been, however, explained in schedule II under rule 8, relating to the qualifications of electors as follows :—

“If any question arises as to whether any person is or is not a Sikh, he shall be deemed respectively to be or not to be a Sikh according as he makes or refuses to make in such form and manner as the Local Government may by regulation prescribe a declaration that he is a Sikh. According to form no. VII attached to the regulations, the declaration prescribed by the Local Government is as follows :—

‘I solemnly affirm that I am a Sikh, that I believe in the Guru Granth Sahib, that I believe in the Ten Gurus, and that I have no other religion.’

“Judged by this test, there is no doubt that the petitioner is not a Sikh. He refused to make the above declaration both before the returning officer and before us. In fact, his name was placed on the electoral roll of the non-Muhammadan constituency on his own motion, as already stated. It is, however, argued for the respondent that the above test is not binding on us, so far as rule 6(b) is concerned, and the word ‘Sikh’ should be taken in its general sense. We have been referred to the description of the different types of Sikhs found in the Punjab, as given in the Census reports of 1911-12 (pages 153-55) and 1921-22 (pages 183-87), and it is pointed out that the line of demarcation between Hindus and certain types of Sikhs is extremely faint.

“But general considerations of the above character cannot be of help to the respondent for the purposes of the issue before us. We are concerned with the meaning of the word ‘Sikh’ for the purposes of the electoral rules. For certain reasons, the ‘Sikhs’ have been granted special representation on the Legislative Council. There are different types of Sikhs, and some are not easily distinguishable from Hindus. To whom was the special representation meant to be given? The legislature anticipated the difficulties likely to arise in this respect and has, therefore, given a clear indication of the class of Sikhs to whom special representation was meant to be given. The regulations under rule 8 give an explanation of the word ‘Sikh’ for the purposes of determining the electors for the Sikh constituencies. The declaration laid down as a

test by the Local Government emphasizes that the person must not only believe in the Granth Sahib and the Ten Gurus, but must 'have no other religion'. This, we consider, is the real determining factor. Unfortunately the rules do not make it clear that this definition is meant to be adopted even for the purposes of rule 6(b). But we have little doubt that this must have been the intention. If the legislature did not want to restrict the choice of a candidate, the Sikhs could easily have been left to elect any person they liked,—whether he was a Sikh according to the test of the declaration specified above or not. But the legislature has thought it necessary to restrict the choice of a candidate too to Sikhs. It can scarcely be supposed, in the circumstances, that the word 'Sikh' in rule 6(b) was intended to be taken in a sense different from that of the explanation and declaration referred to above.

"It was urged that we must interpret the rules, as they stand, and that it is not for us to speculate as to what was the intention of the legislature (4 I.L.R. Lahore, 323). But this rule applies only when the words admit of one and only one interpretation. A different rule has to be applied when the words are capable of different interpretations, as in this case. 'The words of a statute when there is a doubt about their meaning are to be understood in the sense in which they best harmonize with the subject of the enactment and the object which the legislature has in view. Their meaning is found not so much in a strictly grammatical or etymological propriety of language, nor even in the popular use, as in the subject or in the occasion they are used and the object to be attained.' (Maxwell: on the Interpretation of Statutes, 5th edition, page 85.) Taking the rules and regulations as a whole, the conclusion seems almost irresistible that the word 'Sikh' in rule 6(b) is used in no other sense than that of the explanation and the declaration given in the regulations under rule 8, and the schedules attached thereto.

"But even apart from the above test, the respondent has in our opinion failed to establish that the petitioner is a Sikh. The only facts which the respondent has attempted to prove are :—

- (i) That the petitioner's father is a Sikh. Every person born of a Sikh father is a Sikh and that, therefore petitioner is a Sikh. *
- (ii) That the petitioner described himself as a Sikh in his application for the B.A. and M.A. examinations, and was so described in the results of those examinations.
- (iii) That petitioner has been described at times as 'Sardar Labh Singh', and has been so described even in some of the posters issued at the last election.
- (iv) That the petitioner was looked upon as a 'Sikh' member of the Gujranwala municipal committee.

“As regards the first point, the petitioner’s father Sundar Singh was produced as a witness. He has, however, deposed that he is a Hindu and not a Sikh. He wears ‘janeu’ and worships idols. He believes in Vedas and Puranas, and the marriage ceremonies, etc. in the family are performed according to Brahmanic rites. The mere fact that he wears long hair and respects the Granth Sahib is obviously insufficient, under the circumstances, to establish that he is a ‘Sikh’. Any Hindu or Muhammadan may respect the Bible, but he does not thereby become a Christian. The respondent has not taken the trouble to produce any witness whose opinion as to who is to be considered a true Sikh could be taken as authoritative. The learned Counsel for the respondent has advanced the extraordinary proposition that Sikhism is merely a sort of caste depending upon birth and not belief. No authority in support of the proposition has been cited, and the position seems to us to be wholly untenable.

“The next point appears to be ‘*prima facie*’ in favour of the respondent, but has been sufficiently explained by the petitioner. The petitioner’s father used to wear long hair, and had a name ending in ‘Singh’. Petitioner himself had a similar name. He was, therefore, taken to be a ‘Sikh’ and was described as such in his school and college days. In those days the line of distinction between Hindus and Sikhs was not so sharply marked, and Hindus, who had a reverence for the teachings of the Ten Gurus, had no objection to being looked upon as Sikhs,—in the sense of a Hindu sect. They, however, never considered themselves non-Hindus. The petitioner, whose opinions on religious subjects were not formulated in his young days, continued to be described as a Sikh as a matter of routine till he left his college; but when the antithesis between the two religions was brought into prominence by the gathering force of the Khalsa Reform movement, he had no difficulty in locating his real faith. For the last 15 years or more, the petitioner has never called himself or been described by others as a Sikh. He has been prominently connected with a number of Hindu institutions and is looked upon as a Hindu leader. In an important Sikh centre like Gujranwala, where there are several Sikh institutions, he has not had any connection with them. The petitioner cannot, therefore, be accused of having renounced his faith merely for the purposes of the election. We have already held that Sikhism is not a caste depending upon mere birth. Even if it be supposed for the sake of argument that the petitioner was, or was considered a Sikh at one time, it does not follow that he must always remain a Sikh. It would be absurd to class a person as a Sikh in spite of his declarations and conduct to the contrary.

“The petitioner being eligible as a candidate and his nomination papers having been wrongly refused, the result of the election must be held to have been materially affected. We are, accordingly,

of opinion that the election of respondent, Niranjan Dass, was *null and void*.

“The respondent should pay the cost of the petitioner, which we assess at Rs. 500.”

ANNEXURE TO REPORT.

Four preliminary points have been raised in this case and will be disposed of by this order.

The first contention raised by the respondent is to the effect that the petitioner filed two petitions ; that he could file only one, and that the one he first filed was not filed within the time allowed by rule 32, and that therefore neither of the petitions could be gone into.

The scrutiny of the nomination papers took place on 6th November, 1923. All the nomination papers presented by the petitioner were held to be invalid, and as the respondent was the only other candidate he was declared elected. The result of the election, however, did not appear in the Government Gazette till the 30th November, 1923, while the respondent filed his return of election expenses on the 3rd January, 1924. Now the first petition was presented to His Excellency the Governor on 3rd December, 1923 while, the second petition was presented on 16th January, 1924. Both petitions are in identical words except that the second bears a note to the effect that the first petition had been filed before the respondent had lodged his return of election expenses, and that therefore by way of precaution a second petition was put in after the return of the election expenses had been lodged.

It was argued that rule 32 (1) (a) lays down that an election petition has to be presented within 14 days from the date on which the return of the election expenses of the returned candidate and the declarations referred to in rule 19 are received by the returning officers. It was admitted that the second petition was filed within these 14 days, but it was contended that the first petition was filed before those 14 days and was premature, and should be dismissed as being against the provisions of rule 32 (1) (a) while the second petition should be dismissed because the candidate had no power to file a second petition. On the other hand, it was argued on behalf of the petitioner that the petitions had been sent to the Commissioners for trial by His Excellency the Governor, and that they had no power to go behind this order and to dismiss them. We do not, however, propose to settle these points as it seems to us quite clear that there is no defect by reason of the two petitions presented in this case. The petitions are exactly the same. One was filed before the period of 14 days mentioned in rule 32 (1) (a) and the other was filed within those 14 days. It is obvious that one or other of those petitions is a good petition, and there is no substance in the contention that because the petitioner filed a second petition by way of precaution he

ought to be penalized by having both the petitions dismissed. We would so decide. We further point out that in England a supplemental petition may be filed to meet some difficulty as to the time at which the original petition was presented (See 2 O'M. & H., 127 and page 686 of Parker's Election Agent and Returning Officer, 3rd edition).

Another point raised by the respondent was that it was competent for him to attack the petitioner, even though the petitioner did not claim the seat for himself, by stating that the petitioner was himself ineligible for election for five years as he had not lodged his return of expenses in the manner prescribed by rule 19, and that the said return was also false in some material particulars. The respondent asked that this question should be gone into by the Commissioners, even though it was admitted that under rule 42 the respondent could not give evidence to prove that the election of the petitioner would have been void if he had been the returned candidate and a petition had been presented complaining of his election.

There is no doubt that a recriminatory statement cannot be filed by the respondent as the petitioner has not claimed the seat. The argument, however, on his behalf was that an allegation which falls within rule 5(4) cannot in itself be made a ground of an election petition as it does not fall within rule 44. Such a ground can only be taken if some other ground falling within rule 44 is also alleged. In the *Attock* case, there was some discussion of this question. In that case the petitioner claimed the seat, and therefore we think that there is a distinction between that case and the present case. Where the petitioner himself claims the seat any ground of attack should be allowed to the respondent. It was held in the *Attock* case that the Commissioners could not report that an election should be declared void on the ground that a false return of election expenses had been made, but such an election could be avoided by a declaration under rule 25 that the seat of the elected person was vacant by reason of ineligibility arising out of the application of rule 5(4). The Commissioners in that case thought in the circumstances of that petition that they should go into the question of the alleged false return of expenses of the petitioner and not leave the question to be decided in a judicial proceeding before a magistrate.

It is quite clear that we are not compelled to go into this question, and we are further of opinion that when the petitioner himself does not claim the seat this question should not be gone into by us, though the respondent can take any steps he cares to have the matter decided by a magistrate. In England recriminatory evidence can be given by the respondent only when the petitioner claims the seat (see Fraser's Law of Parliamentary Elections and Election Petitions, 3rd edition, page 228). We have been referred to no case in which a respondent was allowed to attack the return of the election expenses of a petitioner who did not

claim the seat. For these reasons we decline to go into this question, and in doing so we distinguish the *Attock* case already referred to where the petitioner claimed the seat.

The last point taken arose as follows :—

The respondent alleged that the petitioner was a Sikh while the constituency was a non-Muhammadan one, and that therefore the petitioner could not be a candidate for this constituency. The petitioner, however, raised the objection that this question could not be gone into, because he was shown in the electoral roll of the constituency in question, and it must therefore be taken that he was not a Sikh but a Hindu or rather non-Muhammadan. Here we are of opinion that the point can be raised. Our reasons are as follows :—

Rule 9(3) states that the orders made by the revising authority as regards an electoral roll shall be final. Then rule 10 lays down that every person registered on the electoral roll of any constituency shall be entitled to vote provided that—

- (a) no person shall vote at any general election in more than one general constituency or both in the commerce and in the industry constituency, and
- (b) *no person shall vote at any election if he is subject to any disability stated in rule 7.*

The effect of these two rules is to make the electoral roll final as regards voters except that a voter, if he is on the roll of more than one general constituency can only vote in one of them at a general election, and even though he is on an electoral roll he is not entitled to vote if he is subject to any of the disqualifications given in rule 7, i.e. if he is not a British subject or is under 21 years of age, etc. etc. With these qualifications electoral rolls are undoubtedly final as regards voters. Further paragraph 5 of schedule 11 of the rules states that a person shall be qualified as an elector—

- (a) in a non-Muhammadan constituency (as the present is) who is neither a Muhammadan nor a Sikh :
- (b) in a Muhammadan constituency who is a Muhammadan, and
- (c) in a Sikh constituency who is a Sikh :

provided that such person has certain further qualifications. It is further explained in that paragraph that if any question arises as to whether any person is or is not a Sikh he shall be deemed respectively to be or not to be a Sikh according as he makes or refuses to make in such form and manner, as the Local Government may by regulation prescribe, a declaration that he is a Sikh. Further regulation 2(14) of the regulations published under notification no. 639, dated 20th August, 1923, states

that an objection to the registration of an elector on the roll of a Sikh constituency shall be accepted unless the person objected to appear and makes the declaration in form no. VII appended to these regulations.

From the above discussion, therefore, it is quite clear that a voter can place himself either on a Sikh electoral roll or a non-Muhammadan electoral roll subject to his taking or refusing to take the prescribed declaration. That electoral roll is final subject to certain qualifications in so far as the person is entitled to vote. It does not follow, however, that the same rules apply to a candidate. In fact the rules regarding candidates are so different and so clear that we must hold that in their case it can be challenged as to whether they are Sikhs or non-Muhammadans.

The first rule as regards candidates to be considered is rule 6 which runs as follows :—

6(1) No person shall be eligible for election as a member of the Council to represent a general constituency, unless—

- (a) his name is registered on the electoral roll of the constituency or any other constituency in the province, and
- (b) in the case of a non-Muhammadan, Muhammadan or Sikh constituency he is himself a non-Muhammadan, Muhammadan or Sikh, as the case may be.

(2) No person shall be eligible for election as a member of the Council to represent a special constituency unless his name is entered on the electoral roll of the constituency.

(3) For the purpose of these rules—

- (a) “ General constituency ” means a non-Muhammadan, Muhammadan or Sikh constituency, and
- (b) “ Special constituency ” means a landholder’s, University, commerce, or industry constituency.

This is a general constituency and rule 6(1) applies. If it is assumed that the petitioner is on the electoral roll of the constituency in question (which is his own allegation) then he fulfils the condition laid down in rule 6 (1) (a), but there still remains rule 6 (1) (b) which is to the effect that he must also be in the case of a non-Muhammadan constituency, a non-Muhammadan, i.e. he must neither be a Muhammadan nor a Sikh. It is obvious, therefore, that rule 6 (1) (b) contains an additional qualification for a candidate, i.e. not only must he prove that he is on the electoral roll of the constituency in question which would be sufficient for a voter, but he must go further and prove that in the case of a Sikh constituency he is a Sikh and in the case of a non-Muhammadan constituency he is a non-Muhammadan. The rule is perfectly clear and admits of no doubt.

Regulation 4 of the regulations published under notification no. 641, dated 20th August, 1923, is also important. Regulation 4 (1) (i) is to the

effect that the returning officer shall examine the nomination papers and shall decide all objections which may be made to any nomination and may either on such objection or on his own motion after such summary inquiry, if any, as he thinks necessary, refuse any nomination on any of the following grounds :—

That the candidate is ineligible for election under rule 5 or rule 6.

We have already discussed above what rule 6 is, so that it was the duty of the returning officer to see that all the conditions of rule 6 were complied with. Similarly regulation 4 (2) (a) is to the effect that for the purpose of this regulation the production of any certified copy of an entry made in the electoral roll of any constituency shall be conclusive evidence of the right of any elector named in that entry *to stand for election* or to subscribe a nomination paper, as the case may be, unless it is proved that the candidate is disqualified under rule 5 or rule 6, or, as the case may be, that the proposer or seconder is disqualified under sub-rule (4) of rule 11.

This means that the production of a certified copy of an entry made in the electoral roll of a constituency before the returning officer is conclusive evidence of the right of an elector named therein to stand for election, always provided that that person is not disqualified under the provisions of rule 5 or rule 6. As regards rule 6, therefore, proof can be allowed that in the case of a non-Muhammadan constituency the candidate is a Sikh. This is the only possible interpretation the rules and regulations can bear. We were asked to hold that such a conclusion was absurd. We see no absurdity in drawing a distinction between a candidate and a voter. We would also follow I.L.R. 4, Lahore, page 323, where it was laid down that when the words of a statute admit of but one meaning, a court is not at liberty to speculate on the intention of the legislature and construe them according to its own notions of what ought to have been enacted. Its duty is not to make the law reasonable, but to expound it as it stands. We therefore decide that the respondent is entitled to produce evidence to the effect that the petitioner is a Sikh.

CASE No. LXXX

Saharanpur (N.-M.R.) 1920

(UNITED PROVINCES LEGISLATIVE COUNCIL.)

LALA CHAMAN LAL *Petitioner,*

versus

LALA SHADI RAM *Respondent.*

Amendments and additions in the list of particulars cannot be allowed. (But see ruling in subsequent case Kangra *cum* Gurdaspur, p. 439, *supra*). Failure to furnish material facts and particulars resulted in dismissal of petition.

THE petitioner was one of several candidates for membership to the United Provinces Legislative Council as representing the rural constituency of the Saharanpur district. He was defeated by Lala Shadi Ram by about 3,700 votes. In his petition he seeks to have the latter's election declared void, and prays that he himself may be declared to have been duly elected, on the ground that the successful candidate committed certain corrupt practices which are set forth in paragraph IV of his petition. These are that Lala Shadi Ram himself and by his agents hired a number of hackney carriages and other vehicles for the purpose of conveying his voters to various polling stations, and also established kitchens and refreshment stalls at which voters were treated free of costs in order to induce them to vote for Lala Shadi Ram.

In paragraph V it is stated that "if on further inquiry further discoveries are made, then fresh particulars shall be duly added to this petition". This promise has been kept by the presentation on the 14th February, 1920, to the president of the Commission of what is in effect a supplementary petition under rule 30. In this there are given fresh particulars which all relate to alleged failures on the part of the presiding officers at different polling stations to observe the rules prescribed for the conduct of the election.

In his written statement the respondent has taken a number of objections to the petition. In our opinion the most important of these is that the petition is defective, in that it does not specify the material facts and particulars of the alleged corrupt practices as was necessary under rule 31 of the election rules, and that the general allegations contained in it are too vague and indefinite to admit of a specific reply.

Rule 31 lays it down that the petition "shall contain a statement in concise form of the material facts on which the petitioner relies and the particulars of any corrupt practice which he alleges". There has been some discussion as to the correct interpretation of the terms used in this rule, and in the absence of any previous Indian decision we have turned for guidance to the reported English cases dealing with election petitions. Several of these are quoted by Mr. Hammond in his book "Indian Electioneering". These make it clear that in such a case as the present one the particulars required are the names of the persons whose vehicles were hired, the names of the persons who hired them, the sums paid, the names of the voters who were carried, and so forth. The persons presenting an election petition are bound "to tell the most they can at the time these particulars are given, and, at all events before the trial, to tell as much as they can to put the sitting member and his Counsel upon inquiry and to prevent surprise or expense". "To deliver particulars which contain nothing but the names of the candidates and the character

of the offence suggested and leave everything else in blank and to attempt under them to fish out some possible material from which the blank may be filled up is an abuse of procedure" (*op. cit.*, pages 153 and 154). In the petition now before us no information whatever has been supplied beyond the name of the candidate and the character of the offence suggested, and not one single detail is given which would enable the respondent to make enquiry and collect evidence to meet the charges brought against him.

It has been argued by the learned Counsel for the petitioner that his client has fallen into this error owing to his efforts to attain conciseness. This argument carries no weight. It would have been easy enough for him to follow the English practice and enter the particulars in a schedule attached to the petition. It is further argued that the opposite party was to blame for not asking for any particulars which he might find necessary to enable them to meet the case set up. The answer to this is, that it is no part of the respondent's duty to help out the petitioner's case by repairing his omissions.

Finally, it is claimed that rule 35 directs the Commissioners to enquire into petitions "as nearly as may be in accordance with procedure applicable under the Civil Procedure Code, 1908, to the trial of suits", and that we ought therefore to allow the petitioner at this stage to amend his petition and supply the missing particulars now. The petitioner's Counsel professes to rely on order 6, rule 17, Civil Procedure Code. We hold, however, that rule 35 only makes the Civil Procedure Code applicable to the conduct of the enquiry and not to the petition. In the case of an ordinary civil suit the trial court is empowered to accept, reject, or at any time amend the plaint. This is not so with an election petition, which under rule 30 can be accepted only by the Governor within a limited period of 14 days from the date of publication of the result of the election. Further, there is no provision anywhere in the Act or the rules for the amendment of a petition. Indeed, any such amendment appears contrary to the whole tenor and spirit of the rules. The short time limit permitted and the insistence in rule 31 on the furnishing at once of the full particulars are evidently intended to insure that the returned candidate shall without any delay be informed of the exact nature of the case against him and of the charges which he will have to meet. To allow amendments and additions would be to defeat this very salutary provision.

Another objection taken by the respondent is that the petitioner has claimed a declaration that he himself has been duly elected, but has not, as required by rule 32, joined as respondents all other candidates who were nominated at the election. It appears that there were several other candidates besides Lala Shadi Ram. This objection is, therefore, well founded.

'We find that in failing to give in his petition the material facts and the particulars required by rule 31 the petitioner has failed to show that anything took place at the election which would render it void. We also find that his petition is further defective, in that he has not joined as respondents the other candidates. We, therefore, decide the petition in favour of the respondent and report under rule 43(1) that the returned candidate Lala Shadi Ram has been duly elected.

CASE No. LXXXI

Salem and Coimbatore *cum* North Arcot, 1921

(INDIAN LEGISLATIVE ASSEMBLY.)

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| 1. PERIANNA GOUNDAR, son of Malaya Goundar
of Erasanampatti | } <i>Petitioners,</i> |
| 2. PERUMALSAMI GOUNDAN, son of Periasami
Goundan of Devarayapuram | |

versus

M. SAMBANDA MUDALIAR, returned candidate, High Court, vakil, Coimbatore, Madras Presi- dency	<i>Respondent.</i>
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Where the change of site of a polling station was not sufficiently advertised, held, that as this irregularity disenfranchised a portion of the electorate, it materially affected the result of the election which was declared void.

MR. SAMBANDA MUDALIAR, the returned candidate, secured 2,381 votes, whereas Mr. K. Narayana Sastri, the rival candidate, secured 2,374, the former thus winning by a majority of seven votes. Two electors have presented the petition alleging several irregularities in the conduct thereof.

Though allegations of several irregularities were raised in the petition and in the particulars furnished by the petitioners, their learned pleader, Mr. Gonsalves, at the trial confined himself to the irregularities mentioned in respect of polling station, no. 18, Dharmapuri registration area. The case for the petitioners is that the polling station fixed in the notification in respect of the election to the Legislative Assembly for the Dharmapuri registration area was the Buddireddipatti railway station and that on the 30th November, 1920, the date fixed for election, there was no polling officer or ballot-box or voting papers available at the railway station and consequently the voters had no opportunity to record their votes. The case for the respondent is that though as a matter of fact there was no polling office or ballot-box or voting papers at the said railway station, yet the polling took place at the local fund school in the village of Buddireddipatti about six furlongs from the railway station, and that due intimation was given to the voters by beat of *tom tom* at the railway station.

It was argued that it was not necessary under the rules to notify the particular building at which the polling was to take place and that therefore it could not be said that the voters were misled by any irregularity. Although no doubt it was quite open to the authorities to have said that the voting would take place at Buddireddipatti, *simpliciter*, inasmuch as they fixed the railway station as the place where the polling would take place, the argument that the voters were bound to treat the words, "The railway station" as mere surplusage is, in our opinion, utterly unsound.

From the evidence of the presiding officer, who is a sub-assistant inspector of schools, it appears that he first went to Buddireddipatti railway station on the evening of the 29th of November at about 7 P.M. and informed the station-master that he was appointed by the returning officer (Collector of Coimbatore) as the presiding officer in respect of the polling station no. 18 and that the railway station was fixed as the polling station, and asked the station-master accordingly to place his office at his disposal for polling purposes from 7 o'clock in the morning on the 30th. The station-master not having received any instructions from his official superior (the railway District Traffic Superintendent), expressed his inability to comply with the presiding officer's request. The latter after consulting the village Munsif of the locality, and after inspecting several buildings in the village, fixed the local school as a

convenient building to conduct the poll at, and did conduct the polling at the said school on the 30th from 7 A.M. to 6 P.M. He also says that he wired to the returning officer at once ; and to give due intimation to the voters he arranged with the village Munsif to give notice by beat of *tom tom* in the village and at the railway station. The village Munsif brought the village Thotti to the school at about 7 A.M. and the presiding officer asked the Thotti to beat *tom tom*, and he saw the Thotti leaving the school in the direction of the village beating his drum and giving out that the polling would take place at the school building. According to this witness the village Thotti was first to *tom tom* in the village of Buddireddipatti and then go and stay at the railway station, Buddireddipatti and go on *tom toming* there and inform people of the change of the polling station. No notices were posted at the railway station or at any other places nor was any information given in any other manner. He also states that the village Munsif of this village was the identifying officer in respect of the voters belonging to that village, and that under orders from his superiors he was to be at the polling station the whole day. The presiding officer says that the village Munsif of this village came to the school and was with him from 7 A.M. in the morning to 12-30 P.M. and from 1 P.M. to 6 P.M. and that he left him only for a few minutes "for necessary purposes".

The village Munsif on the other hand states that two persons were sent to beat *tom tom*, one in the village and the other at the railway station, and that about 8 A.M. he left the school and went to the railway station to see if the Thotti, sent there to do the work, was properly doing his work, and that he satisfied himself that the Thotti was really doing his work at the gate of the railway station. The distance between the railway station and the school being about six furlongs, it is quite unlikely that the presiding officer could have failed to notice the absence of the village Munsif, if he really left the polling station for so long a period of time. Not only is the village Munsif's evidence inconsistent with that of the presiding officer, since the latter specifically says that the village Munsif was present the whole day at the polling station except for a few minutes for "urgent calls"; but the presiding officer also says that he asked the village Munsif at about 8 A.M. whether the Thotti had gone to the station, and that the village Munsif replied to him that the Thotti had been sent to the station—not that the village Munsif told him that he had gone to the station and satisfied himself personally that the Thotti was doing his work at the railway station. If the *tom tom* was going on at the gate of the railway station it is natural that many people going to or from the railway station would have known of it. No such persons have been examined ; on the other hand the station-master of the said railway station deposes that he knew nothing of the *tom tom*, and that if *tom tom* was going on at the gate of the station he

could not but have heard it from his house (which is situated between the railway gate and the platform and which he visited two or three times that morning) or even from the platform. We have also the evidence of Mr. C. Venkatachariar, who is the Mittadar of Oblinaickenpatti, Borinaickenpatti and Linganaickenpatti and who pays about Rs. 600 *peishcush* including cess to Government besides about Rs. 300 assessment in respect of ryotwari lands. He is voter no. 21 for the Legislative Assembly and he is also a voter for the Local Legislative Council. He says that he travelled from his village Dharmapuri to the Buddireddipatti railway station on the morning of the 30th and reached the station at about 10 A.M., found no polling booth, no polling officer nor polling box nor voting paper at the station, waited an hour at the station, that the station-master informed him that a polling officer arrived at the station on the night of the 29th and asked for accommodation within the station building for polling purposes, and that he could not give such permission because he received no orders from his superiors, and that the officer accordingly went away to Buddireddipatti village. After waiting an hour, Mr. Venkatachariar sent telegrams to the District Collector of Salem and the revenue divisional officer of Dharmapuri complaining about the absence of polling officer, etc. at the station. The said telegrams are exhibited as B and C and he left the "railway station" at about 11 A.M. to his house at Kadatur, the headquarters of his Mitta and about three miles from the railway station. On his way to Kadatur he met his youngest brother, Parthasarathi Iyengar, voter no. 11, Legislative Assembly and Ramaswami Iyengar *alias* Doraswami Iyengar, formerly village Munsif of Kadatur (voter no. 9) and that both the said voters were on their way to Buddireddipatti railway station to record their votes and that both returned to their homes on hearing from Venkatachariar of his experiences at the railway station. Mr. Venkatachariar states that there were 12 or 13 assembly voters at Kadatur in his street (whose names and numbers in the register are mentioned by the witness) and that those voters came and saw him at about 3 o'clock and that he told them what happened at the railway station and that they did not go to the railway station for recording their votes. The witness also sent complaints to the Secretary to Government, to the District Collector and to several candidates who expected votes at his hands. Mr. Venkatachariar seems to have had the right to record five votes that day—two for the Delhi Assembly and three for the Madras Legislative Council—and that in respect of the Council of State for which also he had a vote he sent his vote directly to the secretary by post.

Though the Thotti says that he was at the railway gate from 7 A.M. till about 12-30 P.M. beating *tom tom* and crying out that polling was taking place at the local fund school and that voters should go thither,

he says he did not see Mr. Venkatachariar though he admits that the said gentleman is well known to him. Mr. Venkatachariar is positive that there was no *tom toming*, etc. at the gate, and having regard to the fact that he had travelled about 20 miles from Dharmapuri to the station that morning for the express purpose of recording his votes, and that he stayed for one hour at the railway station till 11 A.M. and despatched telegrams as already mentioned before leaving it, it is impossible that he would not have noticed the *tom tom* if really there was *tom tom* by the Thotti at the gate. In the circumstances the conclusion seems to be inevitable that there was really no *tom tom* or any other mode of notice given at the railway station, at any rate till after Venkatachariar left it at about 11 A.M. The presiding officer simply gave directions to the village Munsif and the Thotti, and is unable to speak from personal knowledge of anything else.

The further question arises "What is the exact result of this irregularity in this election?" Under clause 3(1) of the regulations framed under section 13 of the electoral rules, not less than 30 days' notice should be given of, among other things, the place or places where the votes of the electors would be taken. We are inclined to the opinion that, if for any reason, the place originally fixed should turn out to be not available at the last moment, polling would be valid if it took place at another place in the neighbourhood, *provided* due notice was given to the electors of the change of place and the place was otherwise not unreasonably inconvenient to the voters, which would depend on the circumstances of each case. Here we find as a fact that no effective steps were taken during a fair portion of the polling period to give intimation of the change of place to the electors, who were informed in the first instance that the railway station was the polling booth, and that, over and above the orders given by the presiding officer and the village Munsif, notice was not in fact published either by *tom tom* or otherwise at the railway station, at least till 11 A.M. In these circumstances it will be for the respondent to show that the voters were not prejudiced. The cases reported in volume II, O'Malley and Hardcastle, page 77 and volume II, O'Malley and Hardcastle, page 184 support our view. Mr. Justice Grove at page 80 of the 2nd volume of O'Malley and Hardcastle's reports points out that two questions arise for decisions: (1) whether the election was conducted in accordance with the principles of the Act, and (2) whether the non-compliance with the rules had affected the result of the election. He thought that the real point was whether the constituency had an opportunity of fairly recording their votes for the different candidates. It would be sailing uncommonly near the wind and as he thought violating the spirit of the Act to enquire how a voter would have voted had circumstances been different. No tribunal can possibly say what would or might have taken place under different

circumstances. One of the principles of the Ballot Act is that voting should be secret and voters could not be compelled to disclose how they voted except upon a scrutiny after a vote had been declared invalid. Here the majority is only seven and there were at least 12 voters who were unable to vote. As mentioned in the judgment of Mr. Justice Kennedy concurred in by Mr. Justice Darling in the *Islington* case, 5 O'Malley and Hardcastle, pages 120 to 125, if the transgressions of the law by the officials being admitted or proved the court sees that it is open to reasonable doubt whether these transgressions *may* not have affected the result, the court is then bound to declare the election void. It appears to us that this is the view of the law which has generally been recognized and acted upon by the tribunals which have dealt with election matters. Again at page 130, "the gist of the judgment of the Chief Justice, Monaghan, is that in such a case the petitioner is not called upon to prove affirmatively that the result of the election was affected by the proved transgression of the law but that the respondents must satisfy the court that it was not and could not be affected". The case in 4 O'Malley and Hardcastle (page 162) is really not against this view, since it appears at page 164 of the report that the election of the successful candidate in that case was by the majority of the electors, which is not the case here. Though the other voters of Kadatur—12 or 13 in number—have not been examined, we have got the positive evidence of Mr. Venkatachariar that two of them who were proceeding to the railway station for recording their votes returned on hearing from Venkatachariar of what had happened at the station, and that the other voters who evidently interested themselves in the election and naturally went to Venkatachariar's house at about 3 P.M. to get information concerning polling station, etc. did not proceed to the station to record their votes after receiving the information given by Venkatachariar. We only allude to this evidence as showing that there is ground for supposing that the result of the election was actually affected by what took place; we do not regard it as a necessary part of the petitioners' case which to our mind is sufficiently established by proof that the irregularity might have had the effect of disfranchising a part of the electorate.

We think that the result of this election has been materially affected by the non-compliance with the provisions of the Act and the rules and regulations made thereunder in the matter of the fixing of the polling station at the Buddireddipatti railway station and accordingly must declare that the election of the returned candidate shall be void.

We regret we have to put the whole constituency to the inconvenience and expense of a fresh election, but having regard to the fact that there was only a very narrow majority of seven, it is obvious that any proved irregularity would necessarily lead to such a result.

The Commissioners will report to His Excellency the Governor-General in accordance with this opinion.

Having regard to the fact that the respondent was free from responsibility for what took place, we make no order as to costs.

CASE No. LXXXII

Shahabad Central (N.-M.R.) 1927

(BIHAR AND ORISSA LEGISLATIVE COUNCIL.)

RAI BAHADUR RAM RAN VIJAYA SINGH .. *Petitioner,*

versus

1. PANDIT DUDHNATH PANDE }
2. BABU RAJESHWARI SINHA } *Respondents.*

Deposit in the local treasury is deposit with the returning officer.

It is not open to an election court to discuss whether any rule or regulation is legal or not.

THE petitioner, Rai Bahadur Ram Ran Vijaya Singh, seeks to set aside the election of the respondent no. 1, Pandit Dudhnath Pande, from the Central Shahabad non-Muhammadan rural constituency and to have himself declared as elected on the ground that the nomination papers of the respondent no. 1 and of the other candidate (Babu Rajeshwari Sinha, respondent no. 2) were invalid in law because they had not made the deposits with the returning officer as required by sub-rule (1) of rule 12 of the Bihar and Orissa electoral rules, and he was the only candidate who was validly nominated. The election is also attacked on the grounds—

- (1) that reasonable facilities were not given to all the electors in the Bikramganj polling area because the arrangements made were such that a substantial number of voters could not exercise their right to vote ; and
- (2) that the principle of secrecy of voting was violated by reason of the presence of one of the polling officers in the ballot rooms.

The respondent no. 1 has not put in any recriminatory petition but has filed a written statement in which he urges that his nomination was valid in law. He denies the allegation as regards insufficiency of arrangement or violation of the principle of secrecy. He says that the polling officers were present in the polling rooms in accordance with instructions issued by the Government.

The validity of the nomination depends on the consideration of rule 12(1) of the Bihar and Orissa electoral rules which runs as follows :—

“ On or before the date appointed for the nomination of candidates, each candidate shall deposit or cause to be deposited with the returning officer the sum of two hundred and fifty rupees in cash or in Government promissory notes of equal value at the market rate of the day ; and no candidate shall be deemed to be duly nominated unless such deposit has been made.”

Thus the rule requires that the deposit is to be made in a certain manner and at the same time expressly declares what shall be the consequence of non-compliance. There can be no question that the provision is mandatory and requires, under settled authorities, a strict compliance. *Vide* Craies' "Statute Law", 2nd edition, page 252 and Maxwell's "Interpretation of Statutes", 6th edition, pages 648 and 650.

As explained in the well-known case of *Woodward vs. Sarsons*, quoted in Hammond's "Indian Candidate" at page 345, "an absolute enactment must be obeyed or fulfilled exactly, but it is sufficient if a directory enactment be obeyed or fulfilled substantially". So it is necessary to exact a strict or rigorous observance as distinguished from a substantial compliance.

The question is : Has the deposit been made in strict compliance with the rule ?

There is no dispute that the deposit by the respondent has been made in the local treasury of which the returning officer, as the Collector, is in charge. The question is whether the words " deposit with the returning officer in cash " include a deposit in the treasury in the circumstance of this particular case.

A deposit with the returning officer cannot be confined to a case of payment into his hands. Suppose the money is placed on a table in which he is sitting, will not that be a deposit to him ? Again, if the money be paid to his cashier sitting in his presence, for the purpose of receiving money, will not the deposit be considered to have been made to him ? Therefore the words must be intelligently construed.

Section 9 of the Revenue Sale Law (Act XI of 1859) speaks of the receipt of a deposit by the Collector before sunset of the latest day of payment. It is a matter of common knowledge that the deposit is made not into the hands of the Collector personally but by a treasury challan. Can it be supposed for a moment that the deposit is not valid if made by a challan in the treasury ? It is evident that the expression " deposited with the returning officer " must be taken as bearing a reasonable construction.

Deposit with the returning officer implies that he must have dominion or control over the money. In the case of land it is not necessary for a person in possession to be actually on the land itself. It is enough if he has dominion or power of control over it. So the test to be applied is whether the deposit is so made that the returning officer has got full control and possession of the money. The challan states that the money is deposited under sub-rule 1 of rule 12 of the Bihar and Orissa electoral rules on behalf of the respondent no. 1 as a candidate for this very constituency.

Thus full dominion over the money is transferred to the returning officer by the petitioner who cannot take it back, and the returning officer will be in a position to have it forfeited under the rules if occasion should arise. Applying this test it will appear that the money was deposited with the returning officer within the meaning of rule 12(1).

Each case must be judged on its own particular facts and circumstances. Having regard to the facts of this case, there can be no doubt that the deposit in the treasury of which the returning officer is in charge as Collector, is a valid deposit.

The petitioner alleges that it was physically impossible for all the voters of Bikramganj polling area (1,673 in number) to have voted at one polling station within the time allowed (7 hours) and that as a matter of fact over 400 people who came to vote were unable to do so. Hence it is contended that the electors were not given reasonable facilities

to vote as required under rule 15 (1) (3) of the electoral rules and the result of the election has been materially affected thereby. It is urged that there should have been at least two polling stations for this area.

In accordance with rule 15 (1) (3) of the Bihar and Orissa electoral rules the Local Government has to make regulations providing, in the case of general constituencies, for the division of the constituency into polling areas in such a manner as to give all electors such reasonable facilities for voting as are practicable in the circumstances, and for the appointment of polling stations for these areas.

The Bihar and Orissa regulation 29 has been framed in accordance with these rules. Under it the returning officer shall select for each constituency as many polling stations as he thinks necessary.

It is to be noted that the expression used is "as *he* thinks necessary" and not "as may be necessary". Thus it is quite clear that under the present regulation the matter is left entirely to the discretion of the returning officer. We are bound to take the rules and regulations as they are and not as they ought to be. Under electoral rule 44 (1) (c) we are entitled to consider whether there has been any non-compliance with the provisions of the Election Act or the rules and regulations made thereunder. However the legality of this regulation no. 29 cannot be called in question by us.

It is urged that there was a polling officer inside the polling room at each of the polling stations and therefore the secrecy of the ballot has been violated, and thus all the votes have been illegally recorded and should not have been accepted.

There is positive evidence that a polling officer, Saiyid Manzoor Rajvi, was placed inside the polling room. There is no evidence about the other polling centres. There is a clear assertion in paragraph 19 of the petition that there was an officer present in the polling room at all the polling stations. There is no express denial of this in the written statement. In fact it is admitted in paragraph 7 of the written statement that an officer was deputed to be present in the polling room under instructions from the Government. Hence we must take it to be admitted that at every polling station in the constituency, there was an officer present in the polling room.

A polling officer was deputed to the polling rooms to help the voters in recording their votes. The polling officer who was inside the polling room at Bikramganj is the only one who has been examined in this case. He is a Government official holding the office of Kanungo. His evidence contains the following passages :—

"I watched the voters that they might not put Assembly ballot-papers into the Council boxes and *vice versa*. I did not watch in what coloured boxes the voters were putting in the ballot-papers. I did not know any of the voters. Nor did I know

the candidates. I am a resident of Gaya district
I had nothing to do with any place in Bikramganj thana in
any official duties."

Thus this officer was there to help the voters. He was a man of a different district and had no official connection with Bikramganj. He knew neither the voters nor the candidates.

Hence there could be no divulging of secrecy so far as this person is concerned. Moreover he swears that he was instructed by the presiding officer and also by his sub-divisional officer to keep strict secrecy. Also section 14 of the Indian Election Offences and Inquiries Act made it obligatory on him to maintain the secrecy of the voting and not to communicate any information calculated to violate that secrecy, on pain of imprisonment.

We may presume that the polling officers in the ballot rooms in other centres were of the stamp of this witness, and received the same instructions.

Paragraph 11 of the instructions issued by Government to presiding officers under rule 29 of the Bihar and Orissa electoral rules lays down that a polling officer will be deputed for the polling compartments, for the following purposes :—

- (1) To point out to voters which compartment is for the Legislative Council and which for the Legislative Assembly.
- (2) To assist voters to place their voting paper in the proper box if they ask for his assistance.
- (3) To see that only voting papers stamped with the official mark are placed in the ballot-boxes.
- (4) To see that electors pass promptly out of the compartments as soon as their votes have been delivered.

In our opinion the deputation of a polling officer (who was quite a stranger to the locality) inside the polling room to assist the voters in recording their votes cannot be said to be violating the principle of secrecy.

While holding that there has been no infringement of the principle of secrecy, we are of opinion that it would have been more desirable for a polling officer to be deputed at the door of the polling room and not actually inside the polling room.

It has been contended that the instruction no. 11 issued to the presiding officers and referred to above is *ultra vires* as being inconsistent with regulation 32 of the Bihar and Orissa electoral regulations. It is not necessary for us to pronounce any opinion on this point, but we may say that the instruction suggests the deputation of a polling officer for the polling compartment and not inside the room. Nor do we think it necessary for the purpose of carrying out these instructions that any

officer should be permanently posted inside the room. He could carry out his duties if he were placed at the door of the room in a suitable position.

It remains to be considered whether, even if it be supposed that there has been a violation of the principle of secrecy by the posting of polling officers inside the polling rooms, the result of the election has been materially affected thereby.

There is no evidence that any elector was prevented from recording his vote or induced not to record it by the presence of a polling officer inside the room. Also there is no evidence that any of these officers endeavoured to induce the electors to vote in favour of any particular candidate. Again there is no evidence that any voter after he has recorded his vote, informed the other voters of the presence of an officer in the room. It is true that one or two witnesses have stated that they felt some delicacy in voting in the presence of the polling officer. But none of them refrained from voting or made a change in favour of another candidate. Besides, although the hearing of this case commenced on the 19th April it was not until three days later, on the 22nd of April, that the witnesses thought fit to make this allegation. We are unable to place any reliance on this belated evidence, and in any case we cannot hold that the presence of a polling officer in the polling room affected the result of the election in any way.

It is urged that the result of the election has been materially affected by the alleged violation of secrecy because none of the votes in this case should have been accepted inasmuch as they were all placed in the ballot-boxes in the presence of a polling officer.

Under regulation 53(1) a ballot-paper shall be rejected if—

- (a) it has not on its back the official mark, and
- (b) it bears any mark by which the elector can be identified.

It is not suggested in the present case that any of the ballot-papers had either of these defects. There does not appear to be any other rule or regulation in accordance with which a ballot-paper shall be rejected on any other ground. Thus the fact that these ballot-papers were put in the various boxes in the presence of a polling officer, who had been deputed to the polling room in accordance with the instructions of Government, is not in itself any ground for rejecting them.

From what has been said above, it follows that the result of the election has not been materially affected by reason of the objections mentioned in the other issues, that the election is not void, and the petitioner cannot be declared to have been duly elected.

In conclusion therefore we hold that the returned candidate, Pandit Dudhnath Pande (respondent no. 1), has been duly elected. We recommend that this petition be dismissed with costs which we assess at Rs. 100 to be paid by the petitioner to respondent no. 1.

CASE No. LXXXIII

Shahabad South (N.-M.R.) 1925

(BIHAR AND ORISSA LEGISLATIVE COUNCIL.)

BABU RAMANUGRAHA NARAYAN SINGH .. *Petitioner,*

versus

BABU SARADA PRASAD SINGH *Respondent.*

Though a certified copy of the electoral roll is conclusive evidence, the returning officer should consider other evidence of eligibility.

The election court can take evidence on this point and reverse the decision of the returning officer.

THE question before us is whether there has been an improper refusal of the nomination of the petitioner which renders void the election of the respondent for the vacancy in the South Shahabad non-Muhammadan rural constituency.

It appears that the 12th November was fixed for the scrutiny of the nomination papers. The petitioner claimed to be a registered elector on the electoral roll of the Central Gaya non-Muhammadan rural constituency and as such to be entitled to stand for election in the vacancy in the South Shahabad constituency. The respondent also was a candidate.

The returning officer having called upon the petitioner to prove that he was entitled under the rules to stand as a candidate, the petitioner produced some printed sheets of paper which he said were copies of the electoral roll of the Central Gaya non-Muhammadan rural constituency. He also produced an affidavit by his father that the petitioner was duly qualified to stand. He also telegraphed to the District Magistrate of Gaya for a certificate as to his qualification to stand and a reply from the District Magistrate was sent the same day to the returning officer, stating that the petitioner was duly qualified. These items of evidence, however, did not seem sufficient to the returning officer and he rejected the nomination of the petitioner.

Thereupon on the following day the other two candidates withdrew their candidature and the election became non-contested and the returning officer made a return declaring the respondent to have been duly elected for the vacancy.

Dissatisfied with this result the petitioner asks us to declare that the election is void.

Now at the hearing before us a certified copy from the electoral roll of the Central Gaya non-Muhammadan constituency is produced which shows that the petitioner was in fact registered as no. 1398 on the electoral roll for that constituency, and that he was in fact entitled to stand for the South Shahabad election. A copy of the full electoral roll of the Central Gaya constituency has also been produced. From these two documents it has been proved to our satisfaction that the petitioner was fully eligible to stand as a candidate. The electoral roll is published in draft and final form under the provisions of regulations IV, XVI and XVII of the regulations framed under the Bihar and Orissa electoral rules. From regulation XVI it appears that after the electoral roll has been finally amended the registration officer is to make a certain number of copies for sale to the public. Two copies are to be certified by the registration officer and to be kept in the Bihar and Orissa Secretariat under the provisions of regulation XVII. From the note to regulation XXIV it would seem that the original is to be kept in the

office of the District Magistrate, and that it is the District Magistrate's duty to issue certified copies from this original to those applying for them. The copy of the full electoral roll produced before us appears to have been purchased by the petitioner under the provisions of regulation XVI and a comparison of the loose sheets produced before the returning officer with this book clearly shows that it is identical with the original from which the book in question was prepared. There can be no doubt that the loose sheets which the returning officer rejected were in fact copies of the finally amended electoral roll of the Central Gaya constituency.

It has to be observed that the heading on the loose sheets giving the name and description of the constituency appears to have been crossed out in red ink. Who did this has not been disclosed. There is also on each page a seal purporting to be that of the district board of Gaya, of the presence of which there is again no explanation. But neither the red ink lines nor the seals are really material parts of the document, and taking it with the affidavit and the telegram we think there was a *prima facie* case that the petitioner was properly qualified to stand, which the respondent did not even attempt to rebut. The returning officer had certainly under regulation XXIV to scrutinize the nomination paper himself and to decide whether under clause (1) of the regulation the petitioner was eligible or not, but having regard to the evidence produced before him and to the papers put in before us, we think that there was an improper exercise of discretion on his part in rejecting the nomination paper.

The question whether there has been an improper refusal must depend on the facts of each case and no general rule can be laid down. The learned counsel for the respondent seeks to limit the power of the Commissioners to take evidence only to cases of misnomer or inaccurate description and to cases of corrupt practice within the meaning of the electoral rules. Rule 44, however, is perfectly general and does not, in our opinion, limit the power of the Commissioners in this way and the authorities also in India support this view.

Learned Counsel for the petitioner has relied upon *Purnea* case (see page 591), where the returning officer having held that the seconder was not an elector evidence was taken by the Commissioners to prove that he was; *24-Parganas (M.R.)*¹ case, where a proposer's name was wrongly entered in the nomination form and evidence was allowed to be given to show that the person claiming to be the proposer was the person referred to in electoral roll; *Insein* case (see page 415), where the proposer was accepted by the returning officer as a competent proposer, but it turned out on taking evidence in the election court that his name

¹ I.E.P. II, 267.

was not in the electoral roll at all and he was not qualified to act as proposer.

These cases show that the powers of the Commissioners are not limited to any particular class of cases and that they are competent to take evidence for the purpose of determining whether or not the grounds mentioned in rule 44 of the Bihar and Orissa election rules exist.

It is certainly true that under regulation XXIV, clause (2), the petitioner might have produced as conclusive evidence of his eligibility a certified copy of the entry in the electoral roll. He failed to do that, but that omission did not preclude him from producing other evidence of his eligibility.

The result, therefore, is that in our opinion there was an improper refusal of the nomination paper of the petitioner and such refusal materially affected the election. The election, therefore, was void and we find that the returned candidate, the respondent, was not duly elected.

With regard to costs, having regard to the fact that the petitioner omitted to take the elementary precaution of being armed with the certified copy, we are not inclined to recommend that any costs should be granted to him.

CASE No. LXXXIV
Sheikhupura (M.R.) 1921
(PUNJAB LEGISLATIVE COUNCIL.)

KHAN DAURAN KHAN *Petitioner,*

versus

MALIK MUHABBAT KHAN AND FOUR OTHERS .. *Respondents.*

Fuller and better particulars may be called for by the court trying an election petition, provided that the petitioner is not allowed to make out a new case.

Undue influence by threat proved. Agency can be established if candidate does not repudiate activities of which he is aware.

ONE legal point in this case has been disposed of by a preliminary order, dated the 31st January, 1921, which may be read as part of this report and is attached as an annexure. The matters with which we now have to deal involve, with one exception only, questions of fact on which, as no possible creation of precedents is to be considered, the report, following the English practice, may be comparatively brief.

Corrupt practices, falling under three separate heads, are charged against the respondent or his agents, namely, bribery, threats of injury and fraud, all three being alleged to have been practised on voters. As regards the charge of bribery, which is imputed to persons acting as the agents of the respondent, although a certain amount of evidence has been produced in support of it, we are of opinion that it has not been sufficiently made out, and we find against the petitioner in this respect.

Under the head of threats of injury it is charged against the respondent that, during the canvassing which took place before polling day, the respondent and agents of his threatened voters in various villages with theft of their cattle, if they voted for the petitioner rather than for the respondent. It is alleged (1) that the respondent is regarded as the head of the Wagah clan of the tribe of Janglis who are the original inhabitants of the Bar country, of which a considerable part of the Sheikhpura district consists: this tract has been colonised by settlers from other parts of the Province in consequence of the introduction of canal-irrigation; (2) that these Janglis, including the Wagahs, are notorious cattle-lifters, and, as such, are regarded with apprehension by the colonists; and (3) that consequently such threats would come home with special force to those colonists, who were thus threatened. We have no hesitation in finding that the allegations here set out have been amply proved by the evidence put before us. For the respondent it is not denied that he is regarded as the head of the Wagah clan, and the attempt to show that the Wagahs are not notorious as cattle-lifters has, in our opinion, entirely failed; the numerous witnesses for the respondent who say that by the term "Janglis" is meant Pakhiwaras, Bazigars, etc.—simply discredit themselves, and the positive assertion that they are not known as cattle-thieves is outweighed by the evidence of more credible witnesses on the other side.

For the purpose of this report it is not really necessary for us to decide whether the respondent himself is an actual *rassagir*, or member of gang of cattle-thieves: there is, it is true, a mass of oral evidence to this effect which is countered by oral evidence of the opposite tendency and by the production of a large number of certificates of good work from officials, including police officers, granted to the respondent at various times during the last 20 years. We are not inclined to look upon the respondent's oral evidence or these certificates as excluding the possibility

of the truth of the charge, but, be that as it may, our conclusion is that, whether rightly or wrongly, he is certainly regarded by the colonists as in league with the Wagahs in the matter of cattle-lifting and as being able to control their activities in this direction. The only point therefore remaining for discussion in this connection is whether the threats charged were in fact uttered to any voter by the respondent or by any agent of his. Now if this were a case subject to the ordinary course of appeal, we should feel bound to enter upon and set down a review of the evidence on both sides, in spite of the difficulty, of which we are conscious, that, in view of the above findings, the naming of the specific witnesses upon whom we rely might lay them open to special retaliation from the cattle-lifters of the tract. As it is, we do not consider it either necessary or desirable to name such witnesses and, after prolonged consideration of all the evidence, and weighing its value with the greatest care in the light of the lengthy arguments addressed to us, we record only our finding that the use of threats, as charged, has been proved against the respondent, M. Muhabbat Khan himself.

There is a considerable body of evidence against a number of other persons who are alleged to have been agents of the respondent, but for various reasons we feel some doubt as to its value or adequacy as against specific individuals, with two exceptions, and we give the benefit of that doubt to all except those two. The exceptions are Rahmat of Bhattiánwála and Hasham of Dharor, and we find that these men, who are notorious *rassagirs*, were guilty of using threats of the same kind in numerous villages in order to secure votes for the respondent. We also find that they must be held to be agents of the respondent; they are proved to have canvassed for him to such an extent that he must have known of it: he never repudiated their actions, and must thus be held to have adopted them as agents, although there is no direct proof of their actual appointment as such. The law of agency in election has long been held in England to go much further than the ordinary law of principal and agent: as said on page 76 of Fraser's "Law of Parliamentary Elections and Election Petitions" (2nd edition), "where there is no express appointment the agency must be inferred from facts", and again on page 81 of the same work, "the fact that a candidate has expressly or impliedly employed any person to canvass for him will generally, but not necessarily, constitute that person his agent". In the *Wakefield* case (2 O'M. & H., page 103) Grove, J., said "a candidate is responsible generally, you may say, for the deeds of those who to his knowledge, for the purpose of promoting his election, canvass and do such other acts as may tend to promote his election, provided that the candidate or his authorized agent has reasonable knowledge that those persons are so acting with that object". The same Judge in the *Wigan* case (4 O'M. & H., page 12) laid down that "there may be cases in

which canvassing would not necessarily involve agency, but general canvassing has always been held to be strong evidence of agency and evidence which requires a very strong case to rebut it, if it can be rebutted". Applying these principles to the evidence before us we find the fact of agency proved and decide accordingly.

The last charge is that of fraud in that on the day of the polling at Sangla, namely, 6th December, 1920, various agents of the respondent, finding that the voting was going strongly against the respondent in that place, which was the petitioner's own town, were sent out to turn back persons coming in to vote by falsely informing them that there had been a compromise between the parties, and that there was thus no use in their proceeding further.

No evidence has been produced to show that the voting at Sangla fell off after the time of the alleged fraud, and, in the case of three out of the five villages, the voters from which are said to have been so deterred, we may say at once that the evidence is not sufficient to prove the allegation, and, further, that in the case of the two latter, there is nothing to connect the person, who is said to have made the false statement, with the respondent. The case as regards the two remaining villages is stronger, but we think not strong enough to reach the standard of proof required to support a quasi-criminal charge. Although there is a mass of evidence produced, witnesses of the kind put forward are easily procured, there are unexplained discrepancies in their statements, and in both cases the inaction of the voters is susceptible of reasonable, and, indeed, probable, explanation on other grounds. We therefore think that the benefit of the doubt should be given to the respondent and we find this charge unproved accordingly.

It follows from this decision that the petitioner is not entitled to a declaration that he has himself been duly elected. He has failed to show, as he endeavoured to do by the evidence last discussed, that he obtained a clear majority of votes over the returned candidate, and we cannot hold that the votes given for that candidate are absolutely thrown away. There is no provision in the Indian law to this effect and the English law is against any such proposition; in this connection we need only refer to the authorities quoted on page 130 of Rogers on Elections, volume II, edition of 1918.

In accordance with rule 43(1) of the Punjab electoral rules, we shall humbly advise His Excellency the Governor that the returned candidate, M. Muhabbat Khan, has not been duly elected.

Of the numerous persons alleged to have been guilty of corrupt practices we can only find the charge proved, as will appear from what has been already said, in the case of the respondent himself, M. Muhabbat Khan, of Karkan, in that of Rahmat, son of Lakha, of Bhattiánwála, and in that of Hasham, son of Dasaundhi, of Dharor, both in the Muridke

Thana of the Sheikhupura district, the corrupt practice, in each case, being that of undue influence by threat of injury, falling under rule 2 of schedule IV of the Punjab electoral rules. As required by rule 45 of the same rules, we report accordingly.

As regards costs, we decide, after taking into consideration all the circumstances of the case, the charges proved and unproved, and the expenditure incurred by both sides, to award the petitioner a lump sum of Rs. 1,000, to be paid to him by the respondent.

ANNEXURE TO SHEIKHUPURA CASE.

In this case an objection has been taken in the respondent's written statement to paragraph 6 of the election petition on the ground that the allegations made in it are vague and indefinite, and it has been urged that the petition should be dismissed for want of necessary particulars.

Mr. M. S. Bhagat, who appeared for the respondent no. 1, while not going so far as to question the powers of the commission to allow amendment of a petition by the addition of further particulars, laid stress on the provisions of rule 31 of the Punjab electoral rules requiring particulars of any corrupt practices alleged in a petition to be embodied in the petition, and contended in the alternative that the petitioner should be called upon to give better particulars in order to enable the respondent to meet the case against him. The arguments addressed to us on this point on both sides covered no more than the grounds taken in the preliminary arguments in the *Lahore* case which have been dealt with at length in the preliminary order passed in that case, and it does not seem necessary to go over the same ground again. Suffice it to say, that we do not see anything in the Punjab electoral rules justifying the view that a petition, which gives particulars of the acts relied on, is to be summarily rejected for want of fuller particulars. On the contrary, there is authority in the Civil Procedure Code for allowing further and better particulars to be given, with the reservation that the petitioner is not to be permitted to make out a new case. The object of furnishing such particulars is to avoid surprise to the respondent, and from that point of view they are as necessary in the interests of the parties concerned as in those of justice and fair play. The practice in England also supports this procedure. The petition in the present case gives the material facts on which the petitioner relies, and so far as the supplying of further particulars goes, the petitioner in his replication to the written statement has not only expressed a willingness to supply such particulars as may be ordered, but has actually supplied them to an extent which, we think, should give the other party the information they can reasonably require to be furnished to them, without giving details of the whole of the evidence on which the petitioner is going to rely. We now proceed, therefore, to frame issues in the case.

CASE No. LXXXV

Sholapur District (N.-M.R.) 1927

(BOMBAY LEGISLATIVE COUNCIL.)

DATTATRAYA TRIMBAK ARADWYE *Petitioner,*

versus

1. SHAMRAO PANDURANG LIGADE	} <i>Respondents.</i>
2. NAGAPPA ARALLAPPA ABDULPURKAR	..	..
3. JAYSING POWAR	..	..

An election court cannot question the admission of a petition or
recriminatory petition by the Governor.

Recount and scrutiny held and ballot papers examined.

Dual voting discussed.

THE petitioner and the three respondents were the candidates who contested at the last general election in November, 1926, the one seat in the provincial Legislative Council allotted to the Sholapur District rural non-Muhammadian general constituency.

As the result of the scrutiny the returning officer declared the first respondent, Mr. Ligade, duly elected, as having secured the largest number of votes. The votes secured by each of the candidates were declared to be as follows —

Mr. Shamrav Ligade, respondent no. 1	..	2,612
Mr. Nagappa Abdulpurkar, respondent no. 2	..	2,601
Mr. D. T. Aradhye, petitioner.	..	2,588
Mr. J. Powar, respondent no 3	..	152

Mr. Aradhye, who came third according to the above result presented this election petition to His Excellency the Governor under rule 32 on the 23rd December, 1926. His petition not only calls in question the election of Mr. Ligade, but further claims a declaration that he himself has been duly elected, and therefore as required by rule 34 he has joined all the other candidates as respondents to the petition.

Recriminations have been filed during the trial by both the respondents. The written statements of all the respondents were filed on the 3rd March, 1927. The recriminatory petition of the respondent no. 2 was filed on the 4th March while that of the respondent no. 1 was filed on the 8th March. The respondent no. 2, Abdulpurkar, claims to have been duly elected in his written statement as also in his recriminatory petition, and both the respondents bring recriminatory charges not only against the petitioner, but also against each other, alleging *inter alia* the commission of corrupt practices by their polling agents and canvassers.

Respondent no. 2 has taken a preliminary objection that the petition was premature, inasmuch as it was presented on the 2nd January, 1927, i.e. before the date (11th January, 1927) on which the return of the election expenses of the returned candidate and the declarations referred to in rule 19 were received by the returning officer. We are agreed that this preliminary objection must fail, for on the assumption that the objection was valid, the petition should have been dismissed by His Excellency the Governor. It was admitted that the Commissioners had no jurisdiction to go into the question as the Commission is set up only after the Governor is satisfied that the provisions of rule 32 among others have been complied with.

An issue was framed as to whether the recriminating respondents were entitled as between themselves to lead evidence (of the kind

mentioned in rule 41) one against the other. The principal question underlying this issue is whether a respondent during the inquiry can claim a seat for himself by his written statement in answer to the petition, or by his recriminatory petition. We were agreed that the wording of rule 42 did not allow the respondent no. 2 to give evidence against the returned candidate (respondent no. 1). In our opinion the words "may give evidence to prove that the election of such candidate would have been void if he had been the returned candidate" could not apply to the person who actually is the returned candidate. Accordingly we did not permit him to do so. On the question whether the respondent no. 1 could lead such evidence against the respondent no. 2, the Commissioners were divided in opinion and provisionally allowed him to do so reserving their decision on that part of the issue. Eventually, however, it did not become necessary to record a finding on the point as the result of the recount, scrutiny and evidence showed that the respondent no. 1 did not stand in need of leading any evidence against the respondent no. 2 and dispensed with such evidence.

The petitioner asks for a general recount and scrutiny of the votes. He alleges discrepancy between the total number of votes submitted by the polling officer and that reported by the returning officer. The improper rejection of valid votes, and the acceptance of invalid votes by the returning officer is urged by all the parties to this petition. Having regard more particularly to the small difference between the votes reported by the returning officer as secured by the different candidates, we considered this to be a fit case for allowing a recount and scrutiny.

On the recount we find the following figures of votes to be the correct ones instead of those given by the returning officer :—

2,615 votes for Mr. Ligade,
2,603 votes for Mr. Abdulpurkar,
2,587 votes for Mr. Aradhya,
152 votes for Mr. Powar.

We shall start with these figures and add such further votes as each of the contesting parties appears to us to be entitled to, and deduct such as are lost to each of them under our scrutiny and findings on the evidence recorded.

Before recording the result of our scrutiny we will state the general principles on which the ballot-papers were scrutinized and examined by us. We are of opinion that under regulation 4(2) in part VI of the Bombay electoral regulations it is competent to us at this inquiry to reverse the decision of the returning officer rejecting a vote, even though no objection may have been taken to such rejection before him. We

have scrutinized such votes as the parties contended were wrongly admitted by that officer, and such others as were contended to have been wrongly rejected by him. In doing so, we have been mainly guided by the principles enunciated by Mr. Justice Hawkins in the *Cirencester* case (1893 ; 4 O'M. & H., page 196). As decided in that case, we started with the presumption that the fact of a voter having applied for and received a voting paper afforded sufficient indication of his intention to vote. With this presumption we looked at the ballot-papers with a view to see if such intention was carried out and indicated by the mark or marks made by the voter on it. Subject to other objections we have given "effect to any mark on the face of the paper which in our opinion clearly indicated the intention of the voter, whether such mark were in the shape of a cross, or a straight line, or in any other form, and whether made with pen and ink, pencil, or even an indentation made on the paper, and whether on the right or the left hand of the candidate's name or elsewhere within his compartment on the voting paper". As also decided in that case we have held that "if there was a cross opposite to the name of one candidate, and another mark which was not a cross opposite to the name of another candidate, it was a good vote for the first named candidate. But where a mark which is not a cross is the only mark, it was a good vote for that candidate opposite to whose name it appeared". We had counted as good one ballot-paper which had a clear cross in ink placed against the name of a candidate, but this was subsequently struck off, being proved to be void for want of secrecy on the evidence of a witness. We declined to uphold the contention of the petitioner based on the instructions printed on the back of the ballot-paper form given in the Bombay electoral regulations, and in a leaflet distributed by Government among the voters. In our opinion these directions cannot be regarded as mandatory and having the force of law. The petitioner has shown that in a considerable number of cases there is some difference between the name as it appears in the electoral roll and the name of the person who voted under that name. The position he has taken up is that whenever there is any difference whatever of this kind, the vote must be disallowed. The most he will concede is that an obvious misprint of a letter or two may be ignored. Apart from that he contends that the polling officer has no right to accept a vote unless the name given by the intending voter corresponds precisely with the name as given on the roll. We have not accepted this position. The view we have taken is that in every such case it is simply a question of identity, and if there is no good reason to suppose that the person who voted was not the person whose name was intended to be shown on the electoral roll, then the vote should be taken as good. We have considered all the cases pointed out by the petitioner from that point of view, and we

find that he has not shown any sufficient reason for striking off the vote. The result of the scrutiny thus taken worked out as under :—

Mr. Aradhye .—	Mr. Ligade —	Mr. Abdulpurkar —
2,587 votes on the recount ;	2,615 votes on the recount ,	2,603 votes on the recount .
+ 7 votes wrongly rejected ;	+ 4 votes wrongly rejected ;	+ 7 votes wrongly rejected ,
— 2 votes wrongly admitted.	— 5 votes wrongly admitted.	— 5 votes wrongly admitted
<hr/> 2,592 <hr/>	<hr/> 2,614 <hr/>	<hr/> 2,603 <hr/>

These figures have to be further modified as affected by our conclusions on the contentions about voting in more than one general constituency, and voting twice in the same constituency, and our conclusions on the evidence as to votes which should be struck off owing to the disqualification of minority.

Several persons are found to have voted in both the rural and the urban constituencies in contravention of rule 10 (1) (a). The petitioner contends that in such cases both the votes are void. The respondents on the other hand contend that in such cases the second vote only would be void, and that the first vote wherever given was a perfectly legal and valid vote.¹ This argument is sought to be supported by the familiar illustration of bigamy, where the first marriage is perfectly legal, and it is only the second marriage which is void and constitutes the offence of bigamy. The observations of Denman, J., in *Stepney* (1886 ; 4 O'M. & H., page 46) as quoted in Hammond's "Indian Candidate and Returning Officer", page 151, were further relied upon in support of this contention. The language of the rule is indeed not free from doubt. We are however of opinion that the word "vote" in the second clause of the rule is used in a collective sense so as to render the whole vote, i.e. both the votes void. We think that at a general election the act of voting is *one* act, and cannot be split up. This would differentiate the case from that of bigamy, where generally there are two distinct acts. We are inclined to think that if a case of simultaneous marriage was possible both the marriages would have to be declared void. An elector has not necessarily a single vote in a constituency, but has as many votes as there are seats to be contested. At the hearing of an election petition arising with reference to one general constituency it is only the vote given in that constituency which comes into question before the Commissioners, and directly it appears that the voter in question has also voted in another general constituency, he has contravened clause (a) of rule 10, and we think that the words "his vote shall be void" must refer to the vote which is in question, i.e. in this case the vote given in the rural

¹ See paragraph 7 (3) of Part III of Corrupt Practices Order, 1936.

constituency. We do not think that the legislature could have intended that the Commission should be left entirely to depend on the word of the voter as to where he voted first. If the intention of the legislature was that the first vote was good, it could easily have said that in such a case the second vote only shall be void. We have accordingly rejected the vote given in the rural constituency in all such cases, irrespective of whether or not it was given before or after the persons concerned had voted in the urban constituency. We have not however gone further and held that in any such case the voter was guilty of personation as defined in schedule V. The observations of Denman, J., in the *Stepney* case referred to the question of whether the voter concerned was guilty of felony and personation, and not to the question of what should be done in respect of such a vote in taking any scrutiny, as under the English rules it is only the second vote which is void in such a case. The petitioner contended before us that the respondent no. 2, Abdulpurkar, should be held guilty of personation, as after having voted once at the *election* he procured for himself by another application a voting paper in his own name at the *same* election. We have however ruled out this contention as in our opinion the "*election*" referred to in the definition of personation does not include a general election. The inclusion of a general election would reduce the definition to an absurdity, for under that construction the man who votes at a general election in a special constituency and again in a general constituency would bring himself within the definition and would be guilty of the corrupt practice of personation. In fairness to the petitioner, it must be observed that he did not attribute any corrupt intention to the respondent. We have held both in the case of voting in more than one general constituency and voting twice in the same constituency that a *mens rea* or corrupt intention was a necessary element in the offence of personation. We think that the respondent *bona fide* believed that, as his name appeared on the electoral rolls of both rural and the urban constituencies, there was nothing wrong in his voting in both. All the same we have struck off his vote given in his own favour in the rural constituency under our construction of rule 10 (1) (a) and (2).

In a good many cases a voter has been entered twice on the electoral roll in two different areas of the same constituency, and in several such cases the voter has voted twice. There is no express provision in the rules that a voter shall not vote more than once in the same constituency. Apparently such cases would fall under rule 2 of part II of schedule V, and come under personation, which is declared to be a corrupt practice. The petitioner had indeed in his schedule put down all these as cases of personation coming within part II. But as in the case of the respondent no. 2 we considered that his voting in more than one general constituency was *bona fide* and innocent and did not come under personation as defined

in rule 3 of part I of schedule V we similarly hold that the absence of any corrupt mind precludes these cases from coming under rule 2 of part II of schedule V. The only difference is that while in the case of voting in two general constituencies, the whole vote is void owing to the infraction of rule 10 (1) (a) in the other we consider that the first vote should be upheld and the second should be struck off. The question is not entirely free from doubt, and we would suggest an amendment of the rules making it quite clear that in the case of innocent double voting in the same constituency, only one vote and that the first one should count.

We have of course struck off all votes proved to have been given by persons under 21 years of age on the date they voted. Out of the votes so held void four were in favour of the petitioner, two in favour of respondent no. 1 and three in favour of respondent no. 2. These we have struck off from the votes of the respective parties. Out of the votes held void under rule 10 (1) (a), three were recorded in favour of the petitioner and nine in favour of the respondent no. 2. Petitioner proved five cases of double voting in the same constituency, while respondent no. 1 proved one such. The respondent no. 2 none. This respondent attempted to prove a few other cases by the evidence of witnesses and for that purpose asked the Commissioners to examine the signatures of some voters on the counter-foils of their ballot-papers. But the voters themselves were not produced and we considered that no proper foundation had been laid for a scrutiny of these papers. He also adduced some evidence to prove other cases of double voting mentioned in his schedule, but as it was found that this evidence was directed not against the petitioner but against respondent no. 1, the returned candidate, we have not taken into consideration the evidence of these witnesses.

We consider that on the evidence the petitioner has proved that the tendered vote should be accepted in five cases. We permitted him to inspect the list of tendered votes and to call evidence as regards such as were not and could not be mentioned by him. We find that he has proved the validity of the tendered vote in three more cases. In some cases we have accepted the tendered vote, and struck off the vote accepted by the polling officer in favour of another candidate; where however the original vote and the tendered vote were both in favour of one and the same candidate, we have not struck off or added any vote. The nett result of admitting these tendered votes is that five votes would be added to the petitioner's total and two deducted from that of respondent no. 1.

Adding to or deducting from the figures of the votes given for the several candidates above in accordance with our conclusions on the evidence about voting in contravention of rule 10 (1) (a), and (1) (b),

as also about double voting in the same constituency the final result is as under :—

Mr. Aradhye.	Mr. Ligade.	Mr. Abdulpurkar.
2,592	2,614	2,605
—2	—9	—14
<hr/>	<hr/>	<hr/>
2,590	2,605	2,591
<hr/>	<hr/>	<hr/>

Hence the election of the returned candidate Mr. Ligade should be upheld and he be reported as duly elected, and we accordingly do so.

Under Act no. XXXIX of 1920 (The Indian Elections Offences and Inquiries Act, *vide* part II, section 4) “costs” means “all costs, charges, and expenses of or incidental to an inquiry”. This inquiry has shown that the machinery for the preparation of the electoral roll and its supervision and correction is defective. There would probably have been no necessity for this inquiry but for the fact that so many names are shown twice on the electoral roll making double voting possible and the names of so many minors appear on the roll. We think that Government should devise some effective means to prevent these irregularities. On this ground we disallow half the costs of Government and recommend further that the clerk from the Collector’s office, who attended the commission for nearly three weeks and assisted it in the recount and scrutiny and in finding out the requisite ballot-papers and counterfoils should be paid Rs. 100 by Government. Half the costs of Government, however, including the remuneration of the Commissioners specially appointed and the cost of setting up the commission must be borne by the contending parties, i.e. the petitioner and the respondents 1 and 2. Though the election of the returned candidate has been upheld by us, under the circumstances of this case, especially the allegations made in the recriminatory petitions, we direct that the petitioner and the first two respondents should bear these costs equally.

CASE No. LXXXVI

Sultanpur (N.-M.R.) 1927

(UNITED PROVINCES LEGISLATIVE COUNCIL.)

MAHANT HAE CHARAN DAS AND FOUR OTHERS .. *Petitioners,*

versus

KUNWAR SURENDRA PRATAP SAHI *Respondent.*

Solicitation of voters at the poll, unless accompanied by physical coercion, does not amount to undue influence.

Doctrine of *mens rea* discussed. The candidates and agents are held responsible for the purity of the election as regards personation.

A VERY large number of corrupt practices were alleged against the respondent and his agents. The Commissioners disbelieved the numerous allegations of bribery, and also those of undue influence. It was stated that voters were forcibly dragged to the poll. On this point the Commissioners report :—

“ We next come to the alleged snatching of voters of which there is a good deal of scattered evidence. Gajpal Singh says he saw voters being seized by the Deara workers at Kumbhi. But he also tells us that the tahsildar came out and saw the seizing of the voters. , But we find no official evidence of any such seizing. Probably there was a good deal of button-holing and attempts to persuade, but we do not believe there was any use of force. Thakur Dayal Singh says at Deara polling station the Deara workers used to meet the voters at some distance from the polling booth and drag them. But as an inspector and sub-inspector of police were present there and they do not seem to have found reason to interfere, as they certainly would have done if the voters had been compelled against their wills, we cannot think that force was used.

“ Fateh Bahadur tells a story of the seizing of voters by 25 men armed with lathies at Deara polling station, but no complaint seems to have been made to any officer, though the Deputy Commissioner himself visited the polling station. The true facts about the matter seem to have been stated by Mahadeo Prasad. ‘ It is a fact that there is struggling between workers to get hold of voters, and that one agent will pull a voter in one direction, while a second pulls him in a different direction. When they go inside, agents from both sides will follow a man to the last in the hopes of winning him over.’ While by no means approving of this practice, which seems to have been common to both sides, we are not prepared to hold that the voter is coerced by it, or that it amounts to the exercise of undue influence.”

One charge of personation was established. The Commissioners found it proved that “ one Matabadal, son of Gulzar, resident of Indoli, was given the signature slip on being identified by Balgobind, patwari of Indoli, as Matabadal, son of Ram Jiawan, and applied for a voting paper. It is admitted that there were two Matabadals, one son of Ram Jiawan as given in the electoral roll against no. 705 and the other the individual referred to above, son of Gulzar. As seen already it is an admitted fact that Badri Narayan was the respondent's polling agent at the Garabpore polling station. And we might refer to the fact that whereas the respondent in his pleadings chose to deny specifically the petitioners' allegation about the agency of three out of four persons, he did not controvert the same in respect of Rampal Singh, which therefore, under rule 5 of order VIII of schedule I of the Code of Civil Procedure, he must be taken to have admitted.”

The point for our decision has therefore narrowed itself to this, "whether the respondent's agent, Badri Narayan, abetted the personation of Matabadal, son of Gulzar, referred to above".

The petitioners examined two of their polling agents, Mahboob Khan, and Babu Rudr Pratab Singh who is a vakil of Sultanpur, three workers and three officers of the poll and Mr. Hyder Husain, Deputy Collector and Magistrate, S.D.O., Kadipore, the presiding officer.

There is no reason to doubt or discredit the testimony of the above witnesses. They have not contradicted themselves on any material point and have been perfectly frank in admitting the suggestions thrown out to explain that a mistake was possible on account of the crowd and rush of the voters. All that was suggested was that they were workers of the rival candidate, and therefore men who were under the petitioners' influence. But it must be admitted that the petitioners were in a way bound to produce them as men who were present at the spot, and their omission to produce them would have been subject of criticism. As to Mahboob Khan and Sheoram, their conduct was further criticized as dishonest and treacherous because they had seen the first Matabadal being identified and kept on watching the spurious Matabadal also being identified as the son of the same individual by the same patwari without taking any steps to bring the matter to the notice of the officers or the respondent's men. Mahboob Khan and Sheoram have given the reasons for their inability to detect the mistake at the time. But their explanations apart, even if they be supposed to have kept on watching and allowed the thing to go on as is said to entrap the respondent's men, they were perfectly justified, as pointed out in Hammond's "Indian Candidate and Returning Officer" at page 152, last paragraph.

The learned Counsel for the respondent's argument in the alternative was that Badri Narayan was not guilty because he honestly believed Matabadal's statement that he was the son of Jiawan, the patwari having identified him as such only the moment before. He argued that Badri Narayan was right when he said that he did not know Matabadal before, but he doubted the correctness of his statements that he was not with Matabadal at the signature slip clerk's table or that he had no conversation with him before the latter tendered his slip for a voting paper. Even if we were to take the case like that, Badri Narayan would still be guilty under the law. His *mens rea* lay in the fact that he knew or must be taken to have known that he was not to identify a voter whom he did not know personally, but in violation of that rule, he affirmed the voter's false statement that he was Jiawan's son, particularly when the man's identity was questioned by the polling officers and Badri Narayan had himself been taxed for having brought a doubtful voter. His *mens rea* in this case would be of the second form, i.e. "*culpable negligence*".

The *Dinajpore* case (see page 343), was brought to our notice in the course of the arguments. We are unable to subscribe to the view expressed in that case, that the definition of the offence of personation in elections in section 171-D of the Indian Penal Code is shorn absolutely of what is known as *mens rea* in criminal acts. It is first of all incorrect, strictly speaking, to say that it is so. The chapter on General Exceptions in the Indian Penal Code deals with the subject in some of its manifold aspects from its absence up to several degrees of its positive phase ; and, section 6 of the Code enacts that “ throughout the Code every definition of an offence, every penal provision and every illustration of every such definition or penal provision shall be understood subject to the exceptions contained in the chapter entitled General Exceptions, though those exceptions are not repeated in such definition, penal provision or the illustrations ”. The section in the chapter of General Exceptions, being stated as exceptions are put in the negative form. In their affirmative form they represent the law of *mens rea* as applicable to the provisions of the Code.

But we are of opinion that the context of section 171-D itself does not lack in word or expressions to suggest such form of *mens rea* as it contemplates. In order to make ourselves intelligible we might quote the following from Sir John Salmond in his book on Jurisprudence [7th edition (1924), page 790]. The “ *mens rea* may assume one or other of two distinct forms : namely wrongful intention or culpable negligence. The offender may either have done the act on purpose ; or he may have done it carelessly, and in each case the mental attitude of the doer is such as to make punishment effective. If he intentionally chose the wrong, penal discipline will furnish him with a sufficient motive to choose the right instead for the future. If, on the other hand, he committed the forbidden act without wrongful intent, but yet for want of sufficient care devoted to the avoidance of it, punishment will be an effective inducement to carefulness in the future. But if his act is neither intentional nor negligent, if he not only did not intend it, but did his best as a reasonable man to avoid it, there can be no good purpose fulfilled in ordinary cases by holding him liable for it.” We would note next that the apparent peculiarity of the law of personation in elections owes its origin to the fact that the legislature, for what is known in jurisprudence as “ evidential difficulty ” made the candidates and the agents responsible for the purity of election in this respect. It is the duty of the candidates and their agents to help the cause of election by doing all that lies in their power to make it pure, by shutting out doubtful votes irrespective of whether the voter was his or of the rival candidates, a fact they were not expected to know. It is for this reason that it is enjoined that no agent of a candidate should undertake to identify a voter whom he does not know personally, *Jamnore* case (see page 422). The definition in section 171-D

would therefore have failed to serve its purpose if it were not to include *mens rea* of the second form, namely, culpable negligence. The words "knowingly", "intentionally", "voluntarily" or the like on the other hand, the inclusion of which into the wordings of section 171-D is recommended by the learned members of the *Dinapore* tribunal, are qualifying words and denote *mens rea* of the first form. Their use would have meant the exclusion of the other form, viz. negligence. The expression "at an election" in the section reminds sufficiently, in our opinion, the person or persons concerned of the duties the law enjoined on them and the care they were expressed to exercise on that particular occasion. We maintain what Wills, J., said in *Tolson's* case, viz. "The principle involved appears to me, when fully considered, to amount to no more than this. The full definition of every crime contains expressly or by implication a proposition as to a state of mind.

"Our finding is that the respondent's polling agent, Badri Narayan, committed the offence of abetment of personation as defined in the rules."

The Commissioners recommended that the election of the respondent be declared void.

"Ordinarily we should have allowed the petitioners their costs of proving the charges on which they have succeeded, though not of those on which they have failed. But we wish to mark our disapproval of the conduct of the petitioners who have in this petition set out to harass the respondent by raking together a vast amount of frivolous and sometimes completely false charges. The respondent must have been put to great expense in meeting all these charges, and the multiplicity of unessential details, nearly all of which we have found reason to disbelieve, has no doubt been very embarrassing to him in his defence. We think, therefore, that though costs should follow the event, they should be nominal. We recommend to His Excellency the Governor that the respondent be ordered to pay Rs. 100 (one hundred rupees) as costs."

CASE No. LXXXVII
Tanjore (N.-M.R.) 1921
(MADRAS LEGISLATIVE COUNCIL.)

V. P. PAKKIRISWAMI PILLAI *Petitioner,*

versus

RAO BAHADUR VENKATARAMA AYYAR AND OTHERS *Respondents.*

If an extension of time for recording votes is given and then withheld, this amounts to disenfranchising a portion of the electorate and if on a sufficient scale would have a material effect upon the result of the election.

A recount should only be granted in cases substantiated by reliable *primâ facie* evidence.

THIS is a petition by Mr. V. V. Pakkiriswami Pillai challenging the return of three successful candidates in the election of the Tanjore rural non-Muhammadian constituency.

The facts relevant to the point we have to decide are very few and can be very shortly stated. The original date fixed for the elections was the 30th of November, 1920. For several weeks before the day arrived, the Tanjore district was visited by severe floods rendering the movements of the people and the methods of communication difficult, and in some cases impossible ; and accordingly on the 28th of November the returning officer, who was Mr. Dutt, the Collector of the Tanjore district, sought authority from Government to do what he thought to be necessary in the circumstances to preserve the rights of voters, to record their votes and to render those votes effective. Accordingly he received on the 29th of November, 1920 a telegram from the Government of which the material part is this : " In special circumstances Government give you discretion to postpone opening of poll in cases where ballot-papers cannot arrive at polling station in proper time ; also to keep open poll for as many days as may be necessary in cases where floods make it impossible for voters to reach polling station to-morrow." On that Mr. Dutt sent out instructions to the divisional officers and chairmen of municipal councils in the district in the following terms. We are only reading the material part : " Where owing to weather, polling cannot be opened thirtieth, it should be opened fourth December and continued till sixth December inclusive. Inform all polling officers under you immediately."

Those instructions were sent to all the divisional officers and all the chairmen of the municipal councils in the constituency. The result was that in most of the divisions polling did go on from the 30th of November till the 3rd of December, but in two taluks, Pattukkottai and Arantangi, the instructions did not reach the officer concerned. The telegraph wires were cut by the floods, and the messengers with whom duplicates were sent by hand could not reach their destination, and the result was that the instructions were not received by the officers in question until the 4th of December ; and accordingly in 15 polling stations in those two taluks the boxes were closed and returned after the 30th of November. In one station, Gandharvakotta, the box having reached the Collector on the morning of the 1st of December, he sent it back to the officer with instructions to re-open the poll which was accordingly done. We are not called upon to decide what precisely was the effect of that and whether it was a lawful order or not ; because the number of persons who voted in all in Gandharvakotta was 36 and the majority of the successful leading candidate was 127, so that, even supposing that all those votes would have been adverse to the successful candidate it would not have affected materially the result of the election and could not so

have affected it. But with regard to the other 15 stations very much more difficult questions arise.

The argument for the respondent appears to be this: What Government did was to invest the Collector with a discretion to give a further extension by way of indulgence to the voters. Therefore, if he did not, in fact, from whatever cause, succeed in conferring that indulgence upon the voters, then there is no more to be said and matters must rest where they stand. On the other side it is said that what he was invested with was an authority, not merely to grant an indulgence to the voters, but to confer upon them a definite right, viz. the right to exercise their vote at any time up to the evening of the 3rd of December. There is nothing in the rules to guide us as to what is the proper course to adopt in unforeseen and unforeseeable eventualities like this, and we have to come to a conclusion on it as best we can, practically unassisted by anything except the analogies that were suggested by the learned Counsel in argument. Of course, arguing by analogy where the subjects cannot be in *pari materia* is always likely to break down just at the point where the analogy is sought to be pressed home. We feel very great difficulty as to what is the right view to take, but on the whole we have come to the conclusion that, when the Collector despatched the telegram of the 29th of November addressed to the divisional officers and the chairmen of the municipal councils, he had effectively passed an order extending the time for polling, and that the fact that owing to natural causes the telegrams did not reach their respective destinations does not detract from the position that he had committed himself to those orders. We, therefore, are of opinion that, when the polling booths were closed on the 30th of November, though no one was to blame for it, yet it was an irregularity in the conduct of the election, inasmuch as it deprived large numbers of voters of a right which had already accrued to them to exercise their suffrages at a later date, viz. till the 3rd of December.

With regard to the other argument that the whole proceedings including the order of the Government and the order of the Collector to his subordinate officers were *ultra vires*, we do not feel that we need go into it, because in our opinion the respondent would be no better off even if that argument were sound. The effect would be that a large number of people would have given their votes under a misapprehension as to what their rights were: whereas they were only in fact entitled to record their votes on the 30th they abstained from doing so till the 2nd or 3rd of December. In such circumstances it is obvious, on the authority of the cases that we considered carefully in the *Coimbatore*¹ case, that that would be a material irregularity which would obviously affect the result of the election and would necessarily lead to the same

¹ Salem and Coimbatore *cum* North Arcot, page 627.

result as the other process of reasoning, viz. the setting aside of the election. With great regret we feel compelled to set aside this election because there cannot be the slightest doubt—and it is quite frankly admitted by Mr. Alladi Krishnaswami Ayyar, who argued the case for the respondent, that he could not contend otherwise—that, if all the voters of those stations were in fact wrongfully disfranchised, it would not be likely to have a material effect upon the result of the election.

There were one or two other points taken in the course of the argument, but it is only necessary to allude to them very briefly. The first was the allegation that certain votes had been miscounted. That rests on the sole and uncorroborated testimony of Mr. Kuppuswami Pillai who acted as agent to the petitioner and was present at the counting of the votes. He says that certain votes were counted twice over. He made no note of the votes and kept no record, and did not ask for any note to be made on the papers so that he might afterwards identify them. He says he made this complaint to the Collector, but, as against that, the Collector says emphatically that no such complaint was made at all. The only complaint made by Kuppuswami Pillai was that votes which were bad on the face of them were being counted and Mr. Dutt said in terms, “he never complained to me of the actual process of enumeration”. Another allegation was made in the supplemental petition that polling which ought to have taken place at a village called Thappalanpuliur actually took place at another village called Anandakudi, and that similarly polling took place at Alangudicheri instead of at the right place which was Thittacheri. The answer to that is a very simple one, that it has not been proved. The polling officers of both places were called and they said that the polling stations were situated in each case in the right village. In the one case it was a hamlet which was part of Thappalanpuliur called Karayangudi, and in the other case at a place called the Nayudu’s choultry which he says is situated in the village of Thittacheri. The evidence called for the petitioner in contradiction of this appears to us quite unworthy of notice.

During the course of the inquiry an application was made to us for a recount of the votes. It rested on the nebulous allegation of the agents about the counting of batches of votes twice over, and we therefore refused to grant an application of that nature on such slender materials. It is well-established law that a recount will only be granted in cases which are substantiated by specific instances and by reliable, *prima facie* evidence.

We must therefore declare the election as a whole void. There will be no order as to costs.

CASE No. LXXXVIII
Tirhut Division (M.) 1935
(INDIAN LEGISLATIVE ASSEMBLY.)

SHAIKH MUHAMMAD MANSOOR *Petitioner,*

versus

MAULAVI MUHAMMAD SHAFI DAUDI *Respondent.*

Evidence of persons believed to have been bribed should be presented, as they can be granted certificates of indemnity.

Criticism of a man's public activities, however ill-mannered, unfair or exaggerated, is not forbidden. It is when "the man underneath the politician" is attached, and his honour, integrity or veracity assailed that an election is liable to be set aside.

Spiritual intimidation alleged but not proved.

The remuneration of permanent employés engaged on work connected with the election should be shown in the return of election expenses.

THE respondent, Maulavi Muhammad Shafi Daudi, was elected to the Legislative Assembly by the Tirhut Division Muhammadan constituency on the 14th November, 1934. Maulavi Muhammad Shafi Daudi obtained 804 votes. The only other candidate who contested the seat, Maulavi Abdul Hamid Khan, obtained 665. On the 5th January, 1935, an election petition was presented by Shaikh Muhammad Mansoor who is an elector in the constituency. In the course of the trial it has transpired that Shaikh Muhammad Mansoor is little more than a figure-head and that a considerable portion of the money expended in prosecuting the petition has been found by the political party which nominated the defeated candidate. The petition is a lengthy document covering some 25 typed pages. It contained a very large number of charges, some of which were stated in the vaguest possible manner. The law requires particulars to be given of any corrupt practice alleged in the petition. The particulars set out in the three schedules were so inadequate that in effect they were not particulars at all. All that could be gathered from the schedules was that certain agents of the respondent were alleged to have bribed or treated voters or made use of hired conveyances for getting voters to the poll. Not a single voter was named in the schedules, nor was it stated precisely where or in what manner treating had taken place, nor were the owners of any of the hired vehicles said to have been used named. It was, we think, surprising that the respondent did not move to have any portion of the petition struck out or even apply for further and better particulars until the commencement of the trial. When the latter application was made we ordered further and better particulars to be delivered within 48 hours and directed the petitioner in the meantime to proceed with other charges in respect of which further and better particulars were not required.

Dealing with the charges of bribery, the Commissioners found the evidence of the witnesses, which they discussed in detail, unsatisfactory and unreliable.

It is, we think, incumbent on or at least highly expedient for the petitioner in a case of this kind to summon the persons whom he knows or believes to have been bribed. Such persons may have committed a criminal offence but they are bound to answer any questions put to them even if these questions incriminate them. Moreover, the court has power to grant them a certificate of indemnity if they make a full disclosure. Assuming that the various men who are said to have been bribed by agents of the respondent were really bribed the probabilities are, we think, that if they had been put into the witness box, they would have chosen to make a full disclosure in the expectation of being granted certificates of indemnity. Voters who have been bribed are as a rule worthless individuals not likely to be deterred from any sense of shame

from acknowledging what they have done. Nor are they under the same temptation to conceal the truth as the agents of the successful candidate who bribed them. In order to substantiate a charge of bribery it is rarely, if ever, possible to depend on the testimony of persons who merely say that for one reason or another they happened to see money change hands and gathered from what they overheard why it had changed hands. It is extremely dangerous to rely on such evidence unless there are circumstances which go to corroborate it as, for instance, circumstances going to show that very probably bribery did take place. There is no corroborative evidence of this kind in any of these cases and it must, therefore, be held that none of them has been proved. Not only, however, are we plainly of opinion that the evidence relating to bribery which has been put forward by the petitioner is inadequate and unconvincing. We are very much inclined to think that the whole of it has been suborned.

After examining the evidence regarding alleged treating and the hiring of taxis, ekkas and carts, the Commissioners reported as follows regarding the allegation that the respondent or his agents had issued pamphlets, leaflets, posters and other publications, which contained false and damaging statements.

“In India not only a false statement of fact in relation to the personal character or conduct of a candidate but also a false statement of fact in relation to his candidature is liable to render an election void. Maulavi Muhammad Shafi Daudi and his agents are said to have published false statements of fact in relation to his own candidature as well as the candidature of his opponent. It will be convenient to deal, in the first place, with the former class of statements. The poster (exhibit 13) was issued under the signatures of a number of persons, among whom was Mr. Muhammad Ali Jinnah. Admittedly at the time when this poster was issued Mr. Jinnah was not in India. It could not, therefore, have been signed by him. The poster contains a manifesto of the All-India Muslim League and of the All-India Muslim Conference. Mr. Jinnah was the president of the former body. It has been stated and the correctness of the statement has not been denied by the petitioner, that shortly before the last general election took place the All-India Muslim Conference and the All-India Muslim League set up a joint body known as the All-India Muslim Parliamentary Board which set up candidates to contest various constituencies. Admittedly Maulavi Muhammad Shafi Daudi was one of the candidates adopted by the All-India Muslim Parliamentary Board. The mere fact that Mr. Jinnah did not see this poster before it was issued is, we think, immaterial. There were other signatories to the poster, namely, the president of the All-India Muslim Conference, the vice-president of the All-India Muslim League and the secretaries to the All-India Muslim Parliamentary Board. There is no reason to suppose that the poster was issued without the authority

of the All-India Muslim Parliamentary Board or, even if it was, that the All-India Muslim Parliamentary Board would not immediately have approved of it if its authenticity had been challenged during the election. This matter is, in our opinion, absolutely trivial. Another poster of which complaint has been made is one (exhibit 2) which is headed "An expression of confidence in Maulavi Shafi by his Holiness the Great Mufti of Jerusalem". In this leaflet it is also stated that "His Majesty Sultan Ibn Saud, king of Arabia, has expressed his personal confidence in him". It appears that in 1935 Maulavi Muhammad Shafi Daudi was one of a deputation of four which was sent by the Khelafat committee to the Hedjaz to interview His Majesty Sultan Ibn Saud. It also appears that he was a delegate to the World Islamic Congress held at Jerusalem in 1931 and that on a resolution which was moved by Hazrat Mufti Azam he was unanimously elected a member of the standing managing committee. It is said that the poster was issued in order particularly to impress voters who were Ahle Hadis and as such venerated Sultan Ibn Saud. No reasonable exception can, we think, be taken to it. It does no more than describe how, on two notable occasions, the respondent was chosen as the representative of the Mohammedans of India and suggest to the voters that, as a man of some consequence in the Islamic world, he was better qualified to represent them than his opponent. The poster does not, in our opinion, contain any statement of fact in relation to the candidature of the respondent. The false statements in relation to the candidature of Maulavi Abdul Hamid Khan are all to the effect that the Amarat Sharia which was supporting him was in some way or other connected with the congress. For this statement there was, we think, the most ample justification and it was almost certainly true. In the first place, the Amarat Sharia was in favour of some system of joint electorates and not separate electorates. Secondly, several members of the Amarat Parliamentary Board are admittedly still members of the congress party and others have been members of it until comparatively recently. Maulavi Abdul Hamid Khan admitted that he had approached Dr. Mahmud, the secretary of the All-India Congress Committee, and had asked for his support. No doubt he said that he did not receive it. We are, however, doubtful if this statement is correct. More than one of the witnesses who came from Chapra said, for instance, that he had been sent by Dr. Mahmud and the latter would certainly appear to have been taking some interest in this attempt to set aside the election of Maulavi Muhammad Shafi Daudi. Turning now to the false statements said to be in respect of the personal character and conduct of Maulavi Abdul Hamid Khan we may refer, in the first place, to a pamphlet (exhibit 5) issued by Maulavi Abdul Ghani, M.L.C., and to two leaflets (exhibits 4 and 7) issued or purporting to have been issued by one Syed Muhammad Usman, president of the Bengal Muslim Youth League. Maulavi Abdul

Hamid Khan was a member of the Legislative Council from 1927 to 1930 and the pamphlet (exhibit 5) contains a criticism of his activities in the Council during that period. Mr. Yunus has shown by reference to the proceedings of the Council that several of the statements contained in the pamphlet are untrue and that others are inaccurate and misleading. It is well-settled that a distinction must be drawn between criticism of a candidate as a politician or a public man and statements in relation to his personal character and conduct. Criticism of his public activities, however ill-mannered, unfair or exaggerated it may be, is not forbidden. It is only when the man underneath the politician is attacked and his honour, integrity or veracity is assailed that an election is liable to be set aside. We are clearly of opinion that the pamphlet (exhibit 5) contain nothing which offends against the law. The leaflet (exhibit 4) is headed "The worst exhibition of cow worship by Abdul Hamid Khan who is a disgrace to Islam". The other leaflet (exhibit 7) is headed "Bowing down by Hamid Khan who is a disgrace to Islam on the threshold of Pandit Madan Mohan Malaviya". It appears that a conference known as the cow-protection conference was held at Darbhanga on the 13th and 14th November, 1934. Pandit Madan Mohan Malaviya presided over this conference and some weeks before it was held the Darbhanga municipality adopted a resolution recommending that an address should be presented to him. In one of the leaflets (exhibit 7) reference is made to a message of the Associated Press in which it was stated that this resolution was adopted unanimously. Maulavi Abdul Hamid Khan was at the time the vice-chairman of the municipality. In his evidence he said that he did not attend the meeting at which the resolution was adopted and that he tried to dissuade a number of members from supporting it. This may be so. At the same time the statement contained in the leaflets that he supported the resolution and was thus partially responsible for the presentation of the address was a statement in relation to his activities as a public man and not in relation to his conduct as a private individual. It was of much the same description as were the statements relied on in the *Bulandshahr* and the *West Coast and Nilgiris* cases (see pages 237 and 712). Relying on these decisions we hold that the statements contained in these leaflets (exhibits 4 and 7) are not such as to offend against the law. In various leaflets and posters Maulavi Abdul Hamid Khan was described as "a rebel from Islam" and as "a disgrace to Islam" and the like, while Maulavi Muhammad Shafi Daudi was described as "the self-sacrificing devotee of Islam and the servant of religion" and so forth. It is, we think, regrettable that such language was used. At the same time we are clearly of opinion that statements of this kind are not false statements of fact in relation to the personal character of the candidates. The supporters of Maulavi Muhammad Shafi Daudi also had this excuse, it should be said, that the other side had apparently at

the commencement of the campaign issued a leaflet (exhibit B) stating that Maulana Shah Mohiuddin had ordered his disciples to vote for Abdul Hamid Khan. Maulana Shah Mohiuddin is a well-known and much respected Pir with a large following in Tirhut and the implication was that if he supported Abdul Hamid Khan the latter could not but be a better Muslim than his rival. Now, the Maulana, it appears, had merely expressed a wish that his disciples would support Maulavi Abdul Hamid Khan and the conduct of the Nazim Amarat Sharia in issuing the leaflet (exhibit B) making it appear that he had issued an explicit order that they should vote for Maulavi Abdul Hamid Khan and not for Maulavi Muhammad Shafi Daudi was one to which most serious objection could be and very rightly was taken. Lastly, a complaint has been made of the description of Maulavi Abdul Hamid as "a worshipper of the Government" and as "a double slave of the Government and the congress". These statements, too, have to be read in their context. As we have already said, there is every reason to suppose that there was some connection or working agreement between the congress and the Amarat Sharia. It was also admitted by Maulavi Abdul Hamid Khan that when he first entered the Legislative Council he joined the Swaraj party, that subsequently he deserted it, and that after deserting it he was nominated by the Government to various local bodies. We do not think that such statements are at all on all fours with the kind of statement on which the election in the *North Louth* case was set aside (6 O'M. & H., 162). In our view they must be regarded as criticisms of Maulavi Abdul Hamid Khan in his capacity as a politician and, therefore, outside the mischief at which section 4 of part I of schedule V is aimed.

A certain incident took place during the election campaign. Certain charges or allegations, as for instance, that he had concurred in repressive measures taken by the Government in the North-West Frontier Province, were apparently made against Maulavi Muhammad Shafi Daudi by one Maulana Abdul Hashim Muhammad Sajjad. The latter is the naib amir shariat, the amir shariat being Shah Maulana Mohiuddin, the Pir of Phulwari Shariff of whom mention has already been made. In the translations which have been supplied to us the term "amir shariat" has been rendered as "ecclesiastic dictator". On the 4th October 1934, Maulavi Muhammad Shafi Daudi issued a leaflet (exhibit 10) stating that the charges which had been made against him by Maulana Sajjad were untrue and that he proposed to refute them in a pamphlet the preparation of which he had already undertaken. He went on, however, to say that as it was essential that the charges should be refuted in an open and public manner at a very early date he proposed to do *mobahela* or take a solemn oath swearing that the charges were untrue. He invited or challenged Maulana Sajjad to go with him to the mosque at Muzaffarpur and take a similar oath that the charges were in fact true. Each was to

call upon God to witness that what he himself said was the truth, and was to call down the wrath of God on himself if in fact what he had sworn to was false. Some correspondence seems to have passed between Maulavi Muhammad Shafi Daudi and Maulana Sajjad the whole of which is not on the record. Eventually on the 11th October, 1934 both men went to the principal mosque at Muzaffarpur and Maulavi Muhammad Shafi Daudi did *mobahela*. Maulana Sajjad declined to take an oath apparently on the ground that the form in which Maulana Muhammad Shafi Daudi wished him to do so was unacceptable. There can, we think, be no doubt but that Maulavi Muhammad Shafi Daudi and his supporters gave the utmost publicity to this incident. It appears from the return of election expenses that approximately two-fifths of the expenditure which was incurred on the printing and publishing of leaflets was incurred on account of leaflets in which a description of it was given. Moreover, the incident was dilated upon in several articles published in Maulavi Muhammad Shafi Daudi's newspaper, the "Ittehad", and it is in evidence that copies of the "Ittehad" were sent gratis to a number of electors. The case for the petitioner is that in consequence of this propaganda the minds of the voters were so worked upon that many of them were led to believe that if they voted for Maulavi Abdul Hamid Khan they would incur some spiritual disability. In consequence, it is urged, the election was not a free election and should be declared void. The words "induces or attempts to induce a candidate or voter to believe that he or any person in whom he is interested will become or will be rendered an object of divine displeasure or spiritual censure" are based on section 2 of the Corrupt and Illegal Practice Prevention Act, 1883, 46 and 47 Vict. C. 51. This section was enacted in order to deal with the mischief that had occurred in certain constituencies, more particularly in Ireland, where the Roman Catholic clergy had threatened members of their flocks with spiritual disability if they voted in a particular way. The legislature did not contemplate that recourse would ever have to be had to the section against an ordinary layman and so far as appears from the reported decisions no layman and indeed no ecclesiastic belonging to any other than the Roman Catholic church has ever been prosecuted in England for such an offence. In India also no layman seems to have hitherto been charged with it. In the *Muzaffarnagar* case (see page 522) and the *Lahore* case (see page 470), the charge was made against certain maulavis or pirs. The influence exercised by maulavis or pirs over their disciples is comparable in its extent at least, if not in its nature, to that exercised by the Roman Catholic clergy over their flock. We think it is extremely doubtful whether any layman, such as Maulavi Muhammad Shafi Daudi is, can commit this particular corrupt practice. The question is, however, an academic one into which

it is unnecessary for us to enter as, in our opinion, the issue must be decided on the broad ground that the leaflets and pamphlets in which the *mobahela* was described do not contain anything from which a reasonable man could be led to suppose that if he cast his vote for Maulavi Abdul Hamid Khan he would incur some spiritual disability. Mr. Yunus for the petitioner has laid much stress on one leaflet (exhibit 11) which was issued on the 6th October, 1934, that is some days before the *mobahela* was performed. It is true that this leaflet may possibly be held to contain something in the nature of a threat. The threat was, however, directed to Maulana Sajjad personally and not to the electors in general and Maulana Sajjad was not himself an elector. As we have already said, Maulavi Muhammad Shafi Daudi and his supporters obviously made as much capital as they could out of the incident which took place in the mosque at Muzaffarpur and this propaganda may very probably, we think, have had some effect on the electorate. Some voters may have been led to think that Maulana Sajjad had committed a sin and incurred the wrath of God and may for that reason have thought it improper to vote for the candidate of whom he was one of the principal supporters. To hold that is one thing and to hold that such voters cast their votes in the way in which they did as they were led to believe that, if they did otherwise, they would incur some spiritual disability is another. More probably, however, we think, those voters who had been inclined to vote for Maulavi Abdul Hamid Khan and who in consequence of this propaganda eventually cast their votes for Maulavi Muhammad Shafi Daudi were influenced by the conviction that the charges which had been made against him had been disproved.

Mr. Yunus for the petitioner has succeeded in showing that the return of the election expenses submitted by Maulavi Muhammad Shafi Daudi is defective in two respects. In the first place, part B of the return contains the names of certain persons who were employed for varying periods during the election campaign on monthly wages. Two or three of these persons are described as chauffeurs. The majority of them, however, are described somewhat loosely as "volunteers". Mr. Yunus points out that their addresses have not been given and that it was impossible for his client or anyone else to trace them out and verify that they were in fact paid the sums shown against their names. It is clear that the chauffeurs at least were not agents, and very probably the volunteers or most of them were not agents either. The names of these persons and the amounts paid to them ought to have been shown in part K and not in part B. At the same time, we think that Maulavi Muhammad Shafi Daudi was probably misled by the heading of part B into supposing that money paid to persons on account of services rendered and especially to persons who were employed for definite periods should be shown in

this part of the return. The words "description of payee" used in the form are not as precise as they might be and it can be argued not unreasonably, we think, that the respondent gave a description of the payee when he said that he was a chauffeur or a volunteer as the case might be instead of stating where he ordinarily resided and whose son he was which, we imagine, it was the intention of the authority which drew up the form he should do. In the circumstances this defect in the return is not one to which we attach any great importance. The other defect pointed out by Mr. Yunus is, however, a serious one. The constituency is a large one comprising an area of 12,688 square miles and Maulavi Muhammad Shafi Daudi advanced and had to advance sums of money to various persons to carry on the election campaign on his behalf in particular areas. The amounts advanced to these persons have been shown in part D of the return. How much of the sums advanced to them was spent and in what way it was spent does not, however, appear from the return. Whether these persons are regarded as agents who worked without remuneration or whether they are regarded as persons who were authorized by the candidate to incur expenditure for the purpose of promoting or procuring his election, the amounts spent by them should have been shown in detail in the return. In England it has been held that when expenditure is incurred by any person in an election and when this expenditure is not shown in the return the return must be held to be false in material particulars. (Fraser Law of Parliamentary Elections, page 142.) The mere fact that the total sums advanced by the candidate to such persons are shown in the return does not, in our opinion, affect the matter. It must, we think, be held that the return of expenses submitted by the respondent is not in order and is false in material particulars. The result of this finding is that under rule 5(4) of the electoral rules Maulavi Muhammad Shafi Daudi is not eligible for election for five years. Under rule 47, however, we wish to recommend on a number of grounds that this disqualification should be removed. In the first place, we are satisfied that Maulavi Muhammad Shafi Daudi was under a *bona fide* impression that the return which he submitted sufficiently complied with the rules. Mr. Khurshaid Hasnain who has appeared on his behalf has drawn our attention to the concluding words of rule 21, viz. "by any person under the direction of the candidate". Mr. Khurshaid Hasnain has sought to interpret these words as meaning that any particular item of expenditure authorized by the candidate but actually incurred on his behalf by an agent must be shown in the return but that when expenditure is incurred by an agent in pursuance of a general direction of the candidate it is enough that the total expenditure and not the particular items composing it should be shown. This is not, we consider, a correct or even a reasonable interpretation of the rule. At the same time there is reason to suppose that not only the

respondent but the other candidate also understood it in this sense. The return of expenses submitted by Maulavi Abdul Hamid Khan offends in exactly the same way as that of Maulavi Muhammad Shafi Daudi. Moreover, we must accept Maulavi Muhammad Shafi Daudi's assurance that at each of the elections which he has previously contested he submitted a return in the same form to which no exception was taken. Section 27 of the Corrupt and Illegal Practice Prevention Act, 1883, lays down that every contract whereby any expenses are incurred in connection with an election must be entered into either by the candidate himself or by his election agent. Section 28 provides that all payments must be made by or through the election agent or in the case of constituencies where the appointment of sub-agents is permissible through a sub-agent. In India there is nothing to prevent a candidate authorizing any number of persons to incur expenditure on his behalf and advancing sums of money to them to enable them to discharge any contracts they may enter into. It is true that the details of expenditure incurred in this way must be included in the return in the same way as the details of expenditure incurred by the candidate himself, but the obligation to do so has to be inferred from note 1 to rule 2 of schedule IV. The form in which a candidate has to make his declaration is also much less precise than the corresponding form in England which refers pointedly to advances and thus indicates that there is a clear distinction between advances made and expenditure actually incurred.

In this state of the law it is not, we think, very surprising that a candidate who acted as his own election agent and did not have the assistance of an expert on election law in making out the return should have been under a *bona fide* misapprehension as to what was required. Secondly, and this is the main ground on which we base our recommendation it has not been shown that the respondent by himself or through his agents has been guilty except in a very minor and indeed negligible degree of any corrupt practice.

The result is that we find that the election is not liable to be declared void, and that the respondent was duly elected. We recommend that the petition of Shaikh Muhammad Mansoor be dismissed and that he be directed to pay costs to the respondent. The respondent has not adduced evidence and the costs incurred by him apart from the fees of his Counsel must be inconsiderable. In these circumstances we think it proper to assess costs at a lump sum. For this course there is ample precedent both in this country and in England. Having regard to the length of time which the trial has occupied the sum which we consider reasonable is Rs. 1,750 (rupees one thousand seven hundred and fifty). It will be clear from what has been said that many of the charges made were either mendacious or frivolous and not such as could properly and legitimately have been made the basis of a petition at all. The trial of an oppressive

election petition such as this was involves considerable expense of public time and money, and we wish to place on record our opinion that in the interests of the tax-payer the legislature should take steps to penalize an individual who, as Shaikh Muhammad Mansoor has done, prosecutes such a petition at the instance of the political opponents of the successful candidate. There is, we think, no reason why such a person should not be ordered to pay the expenses or part of the expenses of setting up the tribunal especially when, as is usually the case, some of the members of the tribunal are not also members of the judiciary of the country."

CASE No. LXXXIX

24-Parganas Municipal South (N.-M.) 1921

(BENGAL LEGISLATIVE COUNCIL.)

RAI YATINDRA NATH CHOWDHURY *Petitioner,*

versus

SURENDRA NATH ROY *Respondent.*

Though certain irregularities such as the absence of strict secrecy, the presence of an unauthorised person in the polling booth and the marking of ballot-papers for literate voters by the presiding officer, were proved, held, that the result of the election was not materially affected by non-compliance with the regulations. Ballot-papers filled up by presiding officer should not be rejected as invalid.

THE chief ground on which the election of the respondent was challenged was failure to comply with some of the Bengal electoral rules and regulations, in that unauthorized persons were admitted to the polling station, and that no strict secrecy of voting was observed.

The Behala municipal area was divided into six polling stations and these six polling stations were—the Behala vernacular school, the Behala Brahma Samaj, the Behala municipal office, the Barisa high school, the Barisa charitable dispensary and Behala Kamarghat. There were three presiding officers appointed for these six polling stations, and Hon'ble S. K. Sinha, Assistant Magistrate of Alipore, was put in charge of the polling stations at the Behala vernacular school and Barisa high school, while the polling stations at the Brahma Samaj and Behala Kamarghat were put in charge of Deputy Collector, Babu Debendra Nath Bose, and the remaining two polling stations, viz. Behala municipal office and Barisa charitable dispensary were put in charge of another Deputy Collector, Babu Sashi Bhushan Bhattacharji. According to the petitioner's case at all these polling stations with the exceptions of those presided over by Babu Sashi Bhushan Bhattacharji there was no secrecy of voting observed, that the illiterate voters were asked in loud voice whom they wanted to vote for, that the illiterate voters replied in equally loud voice, that the marking of the ballot-papers was in the majority of cases done in such a way that it could be seen by other people, and that at the polling stations presided over by Hon'ble S. K. Sinha the voters in almost all cases, literate or illiterate, were asked by the polling officer whom they wanted to vote for, that the polling officer himself put the cross-mark on the ballot-papers and after folding up the ballot-papers put them himself into the ballot-box. The petitioner also stated that at the Behala Brahma Samaj polling station presided over by Babu Debendra Nath Bose, there was present in the inner enclosure one Sidhi Nath Chatterji, the vice-chairman of the Behala municipality, and one Kristadhan Mukherji, a Commissioner of the same municipality, was present in the inner enclosure of the Behala vernacular school polling station which was presided over by the Hon'ble S. K. Sinha. According to the petitioner's case these persons, Sidhi Nath Chatterji and Kristadhan Mukherji, had no business to be present inside the polling booth, and the presiding officers by allowing them to remain there acted in contravention of the provision as laid down in article XXII of the Bengal electoral regulations. That there were some irregularities committed at the polling stations presided over by Babu Debendra Nath Bose and the Hon'ble S. K. Sinha can admit of no doubt. Deben Babu has admitted that the marking of the ballot-paper was done in such a way that it could be seen by other people if they wanted to see, and the Hon'ble S. K. Sinha was frank enough to admit that in almost all cases without

any discrimination as to whether they were literate he asked the voters whom they wanted to vote for and when the voters gave out the name of the candidate they wanted to vote for, the polling officer himself marked the ballot-papers and did all the rest, viz. folding up the ballot-papers and putting them into the ballot-box himself. As regards the presence of Babu Sidhi Nath Chatterji at the Behala Brahma Samaj polling station and of Babu Kristadhan Mukherji at the polling station at the Behala vernacular school, we are inclined to think that the petitioner has succeeded in establishing this part of his case. Deben Babu himself has admitted the presence of Sidhi Nath at the Behala Brahma Samaj, and Kristadhan Mukherji's presence at the other polling station has been satisfactorily established by more than one witness examined before us. These two men, Sidhi Nath and Kristadhan, were neither candidates nor clerks nor agents appointed in writing by either the petitioner or the respondent. Debendra Babu, the presiding officer at the Behala Brahma Samaj, has taken upon himself the responsibility for allowing Sidhi Nath to remain at the polling booth, by saying that he allowed him to stay there for the purpose of identifying the voters. If Debendra Babu allowed Sidhi Nath to remain inside the polling station for the purpose of identifying voters—a power which the presiding officer could legitimately exercise under the provisions of the article XXII of the Bengal electoral regulations—we do not think the presence of Sidhi Nath Chatterji was in contravention of any of the rules or regulations. But no such thing can be said in the case of Kristadhan Mukherji. As we have said above his presence at the Behala vernacular school has been established beyond doubt, and the presiding officer at that polling station could not say that he had allowed the man to remain there for any legitimate purpose. The findings that we arrive at therefore are :—

- (1) The provisions of section 12(4) of the Bengal electoral rules were not strictly complied with inasmuch as no strict secrecy of voting was observed and there was a certain amount of openness in the recording of votes at the polling stations presided over by the Hon'ble S. K. Sinha and Babu Debendra Nath Bose.
- (2) Some of the provisions of article XXII of the Bengal electoral regulations were violated at the Behala vernacular school polling station inasmuch as one Kristadhan Mukherji, a commissioner of the Behala municipality was allowed to stay in the inner enclosure of the polling station where he had no authority to remain.
- (3) The provisions of articles XXVIII and XXIX of the Bengal electoral regulations were contravened at polling station presided over by the Hon'ble S. K. Sinha, inasmuch as the polling officer himself put the cross-mark on the ballot-

paper for almost all the voters irrespective of the fact whether they were literate or illiterate and the polling officer himself folded up the ballot-papers and himself put them into the ballot-box.

But the non-compliance with the provisions of sections 12(4) of the Bengal electoral rules and of articles XXII, XXVIII and XXIX of the Bengal electoral regulations will not be of much avail to the petitioner, unless it can be shown that the result of the election has been materially affected by such non-compliance. The petitioner has tried in two ways to show that the non-compliance with the provisions of the rules and regulations has materially affected the result of the election, and we propose now to discuss these two ways one after another. According to Rai Yatindra Nath Chowdhury there were some 200 or 300 voters within the Behala municipality who promised to vote for him on condition that the voting would be secret. And the contention on behalf of the petitioner has been that inasmuch as the voting was not secret but open, most of those voters who had promised to vote for him on that condition did not dare to vote for the petitioner and all those votes were consequently lost to him. There is a considerable amount of force in this argument so far as it goes, but there are practically no materials before us which would justify us in holding that if the petitioner secured only 93 votes in the Behala polling area, that was for no other reason than that there was a certain amount of openness in voting. The petitioner, Rai Yatindra Nath Chowdhury, is the principal witness on this part of the petitioner's case and we were much impressed by the way in which the petitioner gave his evidence in court. But the evidence of Rai Yatindra Nath Chowdhury when taken at its full value does not carry us very far in determining the question whether the want of strict secrecy in voting had much to do with the poor support which the petitioner got from the voters within the Behala municipality. Rai Yatindra Nath in the evidence that he gave before us stated that after the votes had been counted by the returning officer, he (the petitioner) met some of the men who had promised to vote for him and asked them why they had not voted in his favour. But with the exception of one or two who do not prove much these men were not produced before us to give their evidence on the point. Rai Yatindra Nath told us that he had made some attempts to produce these men in court. But the only attempt which he appears to have made was to have given directions to his officers and principally to his manager Nitai Chandra Bhaduri to go to the men and ask them to come and depose in his favour. But it is a significant fact that this manager Nitai Chandra Bhaduri was not examined before us. We are therefore unable to hold that the non-production of any of these men, who, according to Rai Yatindra Nath Chowdhury, had promised to vote for him on condition that the voting

would be secret, in the witness box before us, has been sufficiently explained. And in the absence of the evidence of any of these men we are unable to connect the want of secrecy of voting at the polling stations and the poor support which the petitioner obtained from the voters of the Behala municipal area as cause and effect. There was a certain interval between the time when the petitioner obtained the conditional promise from those voters and the date of actual voting, and as undoubtedly the canvassers and supporters of Surendra Nath Roy were also at work during this interval, it was not at all improbable that they succeeded in making those voters change their mind again. The first way, therefore, in which the petitioner wanted to show that the non-compliance with the rules and regulations materially affected the result of the election, in our judgment, fails.

There was another way in which it was sought to be established that the result of the election had been materially affected by the non-compliance with the rules and regulations. It was urged that the votes which were recorded at the polling stations presided over by the Hon'ble S. K. Sinha, should not have been counted at all, inasmuch as there had admittedly been violation of some of the rules and regulations at those two polling stations, and that if the votes that were recorded at those two polling stations go, the small majority of 269 votes by which Babu Surendra Nath Roy was found to have been elected would altogether disappear. The number of votes that were recorded at these two polling stations was considerably more than 269. But the question for our consideration is whether we can regard those votes as nullity. Article XXX of the Bengal electoral regulations is the only enactment under which votes can be rejected as invalid. But there is nothing in this article which lays down that votes are to be held as invalid where secrecy has not been strictly observed; and none of the irregularities which admittedly took place at these two polling stations are to be found anywhere in this article XXX. It was contended before us on behalf of the petitioner that on the question of rejecting votes as invalid we are not to confine ourselves within the provisions made in this article. But this is a contention which we are unable to accept. When the rules and regulations give full instructions on each conceivable point that may arise in the course of an election, and when they give detailed instructions on every step that is to be followed in the whole procedure, we do not think that it was the intention of the legislature that we, while sitting as the Commissioners of an Election Court, should go beyond those specific instructions that have been enacted on any particular point. In this view of the matter we are to a considerable extent supported by what their Lordships did in the well-known election case *Woodward vs. Sarsons* (L.R. 10, C.P. 733). Their Lordships in that case, while rejecting as invalid the 294 ballot-papers which had been marked by the

polling officer in such a way that the voters could have been identified, refused to reject as invalid the 20 ballot papers of polling station no. 125 on the ground that although there had been a breach by the presiding officer of some directions as given in the rules framed under the Ballot Act, there was no breach for which by any enactment the ballot-papers could be rejected. We therefore hold that the ballot-papers at the polling stations presided over by the Hon'ble S. K. Sinha cannot be lawfully rejected by us, and if they cannot be so rejected it would be difficult to see how the admitted irregularities committed by the polling officer at these two polling stations can be said to have materially affected the result of the election. Both the contentions that were urged before us in order to bring the irregularities and non-compliance with the rules and regulations under section 42 (1) (c) therefore fail, and our finding is that although there was non-compliance with some of the provisions of rule 12(4) of the Bengal electoral rules and articles XXII, XXVIII and XXIX of the Bengal electoral regulations the result of the election was not materially affected by that non-compliance.

CASE No. XC
24-Parganas (M.U.) 1924
(BENGAL LEGISLATIVE COUNCIL.)

NAWAB MIRZA SHUJAAT BEG, Khan Bahadur .. *Petitioner,*

versus

MAULAVI MAHBOOBUL HAQ . . . *Respondent.*

After result of the election had been declared an unopened ballot-box was discovered. It was opened and the votes counted, and the decision previously announced was reversed.

A returning officer is not *functus officio* after he declares the result of the polls if the counting has been incomplete.

THE petitioner and the respondent were the only two candidates for election. The 1st of December, 1923, 8 A.M., was fixed for counting of votes. The parties with their agents attended, and the counting was done in their presence. The returning officer announced the result of the poll and declared the respondent duly elected. The petitioner obtained 911 votes and the respondent 936 votes. There were 48 rejected votes. Soon after when the verification statement required by regulation XLVIII was being prepared, it was discovered that one ballot-box from this constituency had not, by mistake, been opened. It appears that in its place a ballot-box of the Hindu constituency had been opened, but the Hindu votes had been rejected. The unopened ballot-box was of the Baduria municipality. The returning officer sent for the candidates at once. The respondent was not found. The petitioner turned up, and an agent of the respondent also came and the contents of the ballot-box were counted in their presence. Two hundred and four ballot-papers were found in the box. Eighty-one votes were in favour of the respondent, while 123 votes were for the petitioner. One ballot-paper was rejected. The total votes for each candidate thereupon stood, for the petitioner 1,034 and for the respondent 1,017. There were 38 rejected votes. Eleven of the votes given by Hindus for the non-Muhammadan constituency were taken out as they did not concern this constituency. This result reversed the decision arrived at when the votes were first counted, and Maulvi Mahboobul Haq was declared elected. The returning officer thought that his first declaration was invalid, but he was not sure if he could make a second declaration, and he thereupon submitted his report to Government for instructions. We do not know what the instructions were, but Maulvi Mahboobul Haq's name was published in the *Calcutta Gazette* as that of the elected candidate. The petitioner thereupon filed his present application.

These facts are not challenged in the written statement filed by the respondent. The respondent made a grievance that he was not present at the second counting of the votes and he submitted that the returning officer should not have opened and counted the votes in the unopened ballot-box after announcing the result of the poll and pleaded that the returning officer was *functus officio*.

Mr. Lindsay, the District Magistrate of the 24-Parganas, who was the returning officer, was examined in the case, and he corroborated the petitioner's case and explained how the papers of the ballot boxes had been mixed up and counted and the result declared and how the mistake was subsequently discovered when the return required by regulation XLIX was being prepared and how the parties were sent for and the ballot papers in the Baduria box counted. It appears from Mr. Lindsay's evidence that the result of the second counting was declared

by him to the people present. The result of Mr. Lindsay's counting is not challenged.

The learned pleader for the respondent contends that the returning officer was *functus officio* after he made the first declaration. It is argued that the returning officer should not have touched the unopened box. Certain English cases have been cited. They are mentioned in Parker, page 385. The English rule is that if a mistake is discovered after the returning officer has declared the result, "the mistake can only be rectified by filing an election petition praying a recount". It seems to us that this is the procedure which has been followed in this case. The returning officer having made his declaration, he was not entitled to reverse his decision. The English cases cited do not show that the returning officer cannot ascertain his mistake. Turning to our rules and regulations, it cannot be said that the returning officer was *functus officio*. He had still to make the return mentioned in regulation XLIX and the report to the Secretary of the Council under rule 44(9). It may be even said that the first declaration was a void declaration as it was made on an incomplete counting. Rule 14(7) states that "when the counting of the votes has been completed, the returning officer shall forthwith declare the candidate, to whom the largest number of votes has been given, to be elected". The counting of the votes had not been completed inasmuch as the contents of the Baduria box had not been taken into account. The returning officer was not, therefore, *functus officio*. Even if he was, it is open to us to take into account the contents of this box.

A complaint was made that the respondent was not present and had no opportunity to examine the box and that, therefore, he was prejudiced. Rule 14(6) had been quoted. It says: "Votes shall be counted and each candidate, the election agent of each candidate, and one representative of each candidate, authorized in writing by the candidates shall have a right to be present at the time of counting." It is proved that the respondent was sent for. He was away and could not be found, but his agent Mohammad Fakiruddin turned up and the counting was done in his presence. It is now said that Mohammad Fakiruddin was not authorized in writing by the respondent to be present at the counting.

The respondent admits that in the morning he took Mohammad Fakiruddin and another gentleman with him to be present at the counting. He admits that Mohammad Fakiruddin was one of his polling agents. It is too late to say that Mohammad Fakiruddin was not his agent and had no written authority. The returning officer is not bound to admit an agent to be present at the counting unless he is authorized in writing by the candidate, but when the candidate takes an agent of his to be present at the counting and the same agent is present at the second counting, it would seem that the requirements of the law have been

fulfilled. If Mohammad Fakiruddin was good enough to be his polling agent, he was good enough to watch the counting on his behalf. The respondent is obviously trying to disown his own representative. As we have said before the counting by Mr. Lindsay is not challenged. It seems ridiculous to us for the respondent to complain of any hardship. The hardship was on the other side since the petitioner was not declared elected in spite of the fact that he had a majority of the votes.

The learned pleader for the respondent contended that the petition was not maintainable inasmuch as the petitioner had not asked for a recount. Rule 33(1) states that "the petition shall contain a statement in concise form of the material facts on which the petitioner relies" and rule 34 says that "the petitioner may, if he so desires, in addition to calling in question the election of the returned candidate, claim a declaration that he himself has been duly elected". The petitioner has done this and has asked that on the votes ascertained by the returning officer, he should be declared and returned as duly elected since he obtained the largest number of votes. If the learned pleader means that all the ballot-papers should be recounted, all we need say is that this is unnecessary. It is common ground that up to the declaration made by the returning officer on the first count, the counting is correct. The only question therefore before us is whether the contents of the box which was subsequently found should be taken into account or not. The petitioner is entitled to proceed on the figures ascertained by the returning officer. The returning officer has deposed that had he made the discovery earlier, he would have declared the petitioner as elected. He stayed his hand because he had already made the declaration. The learned vakil for the petitioner has quoted a case which is apposite: *in re North-Eastern Derbyshire Election, Holmes vs. Lee*, reported in 39 Times Law Reports, 1923, page 423. It appears that in this case three ballot-papers at a Parliamentary election were found in different ballot-boxes after the declaration of the poll: one which was for the petitioner on the date of the declaration and two which were for the respondent after a lapse of 11 days; it was held that as these papers had been inadvertently left in the boxes, in the particular circumstances of the case the three votes must be allowed. We hold that the ballot-papers in the Baduria box must be taken into account.

Our conclusion therefore is that the respondent, Maulvi Mahboobul Huq, was not duly elected and that this election and return should be set aside, and that it should be declared that the petitioner was duly elected from this constituency.

Since the respondent was not responsible for the mistake which has resulted in this election petition, we recommend that the parties should bear their own costs.

CASE No. XCI

United Provinces, Southern (M.R.) 1927

(INDIAN LEGISLATIVE ASSEMBLY.)

MR. SHAKIR ALI *Petitioner,*

versus

MR. YUSUF IMAM *Respondent.*

Where an officer, whose duties keep him at a polling station, is given special privileges for recording his vote by post, it is his duty to take reasonable measures to see that his vote reaches the returning officer in due time. The vote which arrived late owing to negligence of the elector could not be counted.

THE petition raised two points—

- (1) That a certain ballot-paper, noted as “spoilt”, should not have been considered a spoilt voting paper, and the vote recorded in the petitioner’s favour should have been taken into consideration in determining the result of the election.
- (2) That a certain voting paper sent by the district officer of Jhansi to the returning officer at Allahabad and recording a vote in the petitioner’s favour was received by the said returning officer after the declaration of the poll, and should be allowed by the Commissioners.

The petitioner asserted that the allowing of these two votes would result in his obtaining a majority of one over the candidate actually declared elected.

As regards point (1), we have satisfied ourselves that the vote recorded on the said “spoilt” ballot-paper was again recorded on a valid ballot-paper and was duly counted as a vote for the petitioner. This objection, therefore, fails.

As regards point (2), we have satisfied ourselves that the voter in question was permitted under regulation 28 to record his vote at Raksa, which was a polling station for the Legislative Council election, the voter in question being presiding officer at that station. Raksa was not a polling station for the Legislative Assembly election and the voter in question was the only person who recorded a vote for the Assembly election there. This person instead of sending a separate sealed envelope containing this vote to the returning officer included the vote in a packet of voting papers for the Legislative Council which were to be counted at Jhansi on 2nd December. In consequence this vote was not discovered until the 2nd of December and the poll was announced on 1st December.

We consider that this person, being specially privileged to vote in a certain manner, should have taken reasonable measures to ensure that his vote reached the returning officer in due time, and we do not consider that the measures he actually took were reasonable measures to that end. We are therefore of opinion that the vote was not counted owing to the negligence of the voter and that it should not be counted now. We note that the returning officer refused to count three votes on the ground that they had been taken out of a wrong ballot-box and no objection was raised to this by either party. We consider the circumstances analogous.

We are, therefore, of opinion that the second ground of objection also fails.

We, therefore, report that the returned candidate, Mr. Yusuf Imam, has been duly elected. And under electoral rule 45(2) we recommend that Mr. Shakir Ali be ordered to pay Rs. 150 as total costs to Mr. Yusuf Imam.

CASE No. XCII

West Coast and Nilgiris (N.-M.R.) 1924

(INDIAN LEGISLATIVE ASSEMBLY.)

KUMARAN RAMAN *Petitioner,*

versus

K. SADASIYA BHAT *Respondent.*

The respondent, it was held, published a statement regarding the petitioner reasonably calculated to prejudice the prospects of the petitioner's election, but as the statement was not one in relation to the personal character and conduct of the petitioner, it does not fall within the mischief of section 2 of the first schedule of the Corrupt Practices Order, 1936 (rule 4 of schedule V of the Madras rules, 1924).

THE prayer in this petition is that the election of the respondent as a member of the Legislative Assembly for Malabar, South Kanara and the Nilgiris be set aside on the ground that he has been guilty of a corrupt practice within the meaning of rule 4, schedule V of the rules for the nomination and election of members to the Legislative Assembly, in that he published false statements that the petitioner, when a member of the Legislative Assembly, "sacrificed the real interests of the people", "by his voting with the Government for the enhancement of the salt tax", and "by his failing to join in the struggle against the present inequitable provincial impost". It is alleged that it is false to say that the petitioner did so vote, or did so fail to join in the struggle against the impost.

The latter allegation appears to us wholly an expression of opinion of the petitioner's political conduct and no question of its truth or falsity in fact arises. The former statement, viz. that the petitioner voted with the Government for the enhancement of the salt tax is the gravamen of the charge against the respondent. It is alleged that during the course of election in October last, the respondent published in manifestoes and pamphlets issued by him in his electoral campaign, this grave misstatement of fact, which misstatement was reasonably calculated to prejudice the prospects of the petitioner's election.

It is admitted by the respondent in his written statement that it is a false statement. As a matter of fact the petitioner did not vote at all on the question, but was absent at the division. It is further admitted by the respondent that in various leaflets published and used by him in his campaign, this misstatement appeared. There are letters of the 30th September, 1923 by respondent to the editors of three local South Kanara newspapers enclosing copies of exhibit A styled "An Electoral Manifesto". Only one of the three newspapers appears to have printed the manifesto, viz. the "Mangalore Mail" in its issue of 28th October, 1923.

That such leaflets circulated in South Kanara during the electoral campaign up to the date of the election is proved. P.W. 3 deposes that at respondent's request, he printed 5,300 copies of exhibit C-1 and several hundreds of copies of exhibits A, C, D-1 and D-2. These were circulated in South Kanara, but not, so far as appears, in Malabar. They were printed and issued for circulation under respondent's orders and instructions. There can be no doubt of the fact of the publication by the respondent.

Respondent's defence is (1) that when he drafted these leaflets and got them printed, he *bona fide* believed that the petitioner had voted for the enhancement of the salt tax, (2) that he *bona fide* believed so until some weeks after the election was over, and (3) that in any case

the statement is not one in relation to the personal character or conduct of the petitioner.

As to the first point, respondent produces two letters from political friends, and an issue of the *Navayuya* newspaper, dated 27th September, 1923, all implying, if not categorically stating, that petitioner had voted for the enhancement. Respondent pleads that his own general impression of mind was the same and that these statements confirmed that impression, and therefore, he did not go further and attempt to verify the matter from the division lists of the Legislative Assembly, which no doubt he might have bought, or had lent him by others. It appears to be true that when the propriety of the Viceroy's power of certification came again before the Legislative Assembly, the petitioner did vote to uphold the certification. We are prepared to accept the evidence as indicating that the respondent did not, on 30th September, 1923, when the above leaflets and letters were drafted, deliberately make a statement which he knew to be false, or did not believe to be true, though we are bound to record our opinion that he did not show sufficient circumspection or diligence in enquiring before making such allegations against a political opponent. But incidentally we may remark that the petitioner himself did nothing either by way of direct communication with the respondent or by issuing counter-leaflets to correct the misstatement.

As to the second point, it requires more detailed consideration. Respondent apparently did not draw up leaflets for circulation in Malabar until 8th October, 1923, when he drew up exhibits I and I-A for that purpose, exhibit I being in English and exhibit I-A in Malayalam. In these documents any reference to the salt tax and the petitioner's conduct thereon is omitted, along with much other matter which appeared in exhibit A series. Respondent's explanation is that he was not satisfied with the tenor and phraseology and general ideas set out in his first efforts and so he compiled new ones, exhibits I and I-A. We confess ourselves not satisfied with the explanation. Exhibits I and I-A are very colourless documents, and we cannot imagine that if the respondent still believed thoroughly in the truth of his previous assertion that the petitioner had sacrificed the interests of the people by voting with the Government for the enhancement of the salt tax, he would not have reiterated that excellent political cry in his new pamphlets. Taking all the circumstances into consideration, it appears to us that, between the two dates, 30th September, 1923 and 8th October, 1923, respondent had received some information which made him, at any rate, doubtful as to the truth of his former statement. It is significant of this that though the exhibit A leaflets in English would have equally served for Malabar, as they did for South Kanara, they were not so used in that district although they were not withdrawn from circulation in South Kanara.

It is suggested, and we think that there are grounds for the suggestion, that he did not regard exhibit A as suitable for circulation in a district in which the petitioner's doings in the Assembly may have been better known than they were in South Kanara. This inference of our is strengthened by the evidence of P.W. 6, a lawyer of the Calicut Bar, who says that about 19th October, 1923 in the Bar room at Calicut, during a general conversation when the respondent was being accounted responsible for spreading about this false story of petitioner's voting for the enhancement of the salt tax, he disclaimed responsibility, and in proof of his innocence, produced exhibits I and I-A and also exhibit H. Exhibit H is a letter, dated 18th October, 1923, drafted by the respondent himself for circulation to the members of certain Bars in Malabar. It also omits the misstatement contained in exhibit A series, but speaks of "the inconsistent attitude" of the petitioner regarding the salt tax. Respondent does not remember this conversation at the Calicut Bar, but we can see no good ground for rejecting the general story given by P.W. 6, which appears to us both natural and true. It is clear then that at that juncture the respondent's disclaimer of responsibility was wholly disingenuous. Pamphlets of his were then circulating in South Kanara containing the misstatement. He avoided mentioning these and called attention to exhibits I and I-A' only. We are of opinion that the only reasonable explanation of respondent's conduct at this time and of his change of language in exhibits I and H respectively, whereby the original charge against the petitioner of voting with the Government for the enhancement of the salt tax had been watered down to a vague charge of consistent attitude regarding the salt tax, is that in the interval he had come to know that the statement in exhibit A was not true or at least that he had no longer any good grounds for believing it to be true. The language of exhibit H goes far to indicate that by then he had ascertained the true facts about petitioner's attitude and action in the matter of the salt tax, and the respondent's conduct about this time is no longer consistent with his true and genuine belief that the statement in exhibit A was true. Had he retained that belief, that would have been the defence which he would have put forward in the Calicut Bar room and not a disingenuous disclaimer that his pamphlets were not responsible for the rumour that the statement was true. It is clear to our minds that he was then aware that the statement was not true and that he could no longer with safety run the risk of reproducing it in his new circulars.

It was obviously his duty at this stage to arrest the further publication of the misstatement in South Kanara and to publish and circulate corrections in all the localities in which the misstatement had been published, and overtake, so far as he could the misstatement to which he himself had given such a start. So far from doing these things, it is in evidence that no alteration was made in the publication in South

Kanara and that the original leaflets were being circulated within the last ten days before the election and up till the election date (see P.Ws. 2, 5, 7 and 9), while on 28th October, 1923, only three days before the election, the "Mangalore Mail" published the original manifesto of 30th September, 1923 (exhibit A-2), and P.W. 1 asserts that respondent himself asked him about 24th October, 1923, i.e. five days after the Calicut Bar meeting, to insert that manifesto free of charge.

We think that the conclusion is irresistible that, at any rate, about 19th October, 1923, if not earlier even on 8th October, 1923, the respondent did not believe the statement to be true, and yet allowed its publication to continue, and we feel no doubt, therefore, that the respondent did publish regarding the petitioner a statement which he did not believe to be true—a statement reasonably calculated to prejudice (as an exhibit A it was designed to prejudice) the prospects of the petitioner's election.

The remaining question is whether this statement is a statement in relation to the personal character and conduct of the petitioner. This is a point which has been strenuously argued on both sides. We think that the correct method of deciding the point is to determine first, assuming that the statement that the petitioner voted with the Government for the enhancement of the salt tax is true, whether that would be a statement in relation to the petitioner's personal character and conduct. We are agreed that it cannot be so held. No sort of reflection or imputation is on the petitioner's character or conduct by the mere assertion that he voted on a particular measure in a particular way. It is an assertion of a historical fact, a mere setting forth of an account of a political act of the petitioner in his political career. What result that act may have had on the interests of his constituents, whether it will, for instance, be a sacrifice of their interest or not, is not a question of fact, but of opinion, and any statement to that effect is not a statement of fact, but a statement of opinion, and, therefore, will not come within the mischief of the rule.

This conclusion is strengthened by a reference to certain English election cases which have been cited to us, and which have a particularly pertinent bearing on this point, since the very language we are now considering has been taken *en bloc* from the English Corrupt and Illegal Practices Prevention Act, 58 and 59 Vict., chap. 40 in 1895. Six election cases under that Act have been cited to us, reported in vol. V, O'Malley and Hardcastle, pages 53, 89, 153, 186 and 218, and vol. VI, O'Malley and Hardcastle, page 103. In all these, the general principle is that a statement in relation to the personal character and conduct of a candidate must import some reflection or imputation on the character and conduct. The two cases most in point are the *North Louth* case, VI, O'Malley and Hardcastle, 103, and the *Cockermouth* case, V, O'Malley and Hardcastle,

155. The former interprets "personal" as antithetical to *public*, and the latter interprets it as antithetical to *political*. The latter case is particularly instructive. One of the allegations there made against the candidate was in the statement that was made :—

"Electors! Remember that the enemy was besieging British Towns and wrecking British Homes when Sir Wilfrid Lawson voted against sending men, money and supplies."

That is, as here, the statement was that the candidate had voted in such and such a manner in the House of Commons. On this Mr. Justice Darling remarks (page 164) :—

"What Sir Wilfrid Lawson desired from his conduct was, if he could get enough other people to agree with him and go into the same Lobby with him to force the Government to resign, so that there might come into office a Government holding the same opinions as himself about the war, and prepared to bring it to an end upon terms which would approve themselves to him and to his friends. But to say that is not to say that he meant to starve the troops. To say that he did that, is to criticize his political conduct. It is not to criticize his personal character or his personal conduct. And further than that, it appears to me that what he said here about Sir Wilfrid Lawson and his votes is not false, it is to a very large extent true, as I have said. The natural consequence of the vote he gave would be a perfectly constitutional reason for the resignation of the Government and the forming of another, and would not be the starving of the troops in South Africa, and, therefore, *even if it were not true*, it seems to me that that was criticism of the political action of Sir Wilfrid Lawson, and not criticism of his personal character or conduct in any shape or form."

That is, all comment that a man voted in such and such a manner is comment as to his political conduct and not as to his personal conduct.

These rulings were all in 1911 and prior years. The present rules which we are considering were published in 1923. The particular phrase which we are considering was, as we have said, taken bodily from the English Act. We think it is not too much to conclude that the framers of the rules intended this phrase to be interpreted as it had been up till 1923, judicially interpreted in England. At least we are not in this case prepared to place on this phrase a more extended meaning than it has received in election cases in England.

We, therefore, conclude that the statement under consideration is not one in relation to the personal character and conduct of the petitioner. The mere fact that it was false will not then alter its nature or bring it within the mischief of rule 4 of schedule V.

We, therefore, hold that no corrupt practice by the respondent has been proved and the petition cannot, therefore, be sustained and must be dismissed. In the view we take of the respondent's conduct, we direct that each party bear his own costs.

APPENDIX I

**THE GOVERNMENT OF INDIA (PROVINCIAL
ELECTIONS) (CORRUPT PRACTICES AND
ELECTION PETITIONS) ORDER, 1936 ¹**

¹ The differences in the Burma Order are given in the footnotes.

1936 No. 675

INDIA

THE GOVERNMENT OF INDIA (PROVINCIAL ELECTIONS) CORRUPT PRACTICES
AND ELECTION PETITIONS) ORDER, 1936

WHEREAS by section two hundred and ninety-one of the Government of India Act, 1935 (hereafter in this Order referred to as "the Act") His Majesty in Council is empowered to make provision with respect to certain matters connected with elections under the Act :

AND WHEREAS by sub-section (1) of section sixty-nine of the Act His Majesty in Council is empowered to declare certain offences and practices to be offences and practices involving disqualification for membership of Provincial Legislatures and to fix the periods for which the disqualifications are to operate :

AND WHEREAS a draft of this Order has been laid before Parliament in accordance with the provisions of sub-section (1) of section three hundred and nine of the Act and an address has been presented to His Majesty by both Houses of Parliament praying that an Order may be made in the terms of this Order :

NOW, THEREFORE, His Majesty, in the exercise of the powers conferred on him as aforesaid and of all other powers enabling him in that behalf, is pleased by and with the advice of his Privy Council to order, and it is hereby ordered, as follows :—

PART I

INTRODUCTORY

1. This Order may be cited as "The Government of India¹ (Provincial Elections) (Corrupt Practices and Election Petitions) Order, 1936".

2. The Interpretation Act, 1889, applies for the interpretation of this Order as it applies for the interpretation of an Act of Parliament.

3. (1) In this Order, except where it is otherwise expressly provided or the context otherwise requires—

"election" means an election to fill a seat or seats in either Chamber of [a Provincial]² Legislature ;

"prescribed" means prescribed by Act of the Provincial Legislature or by rules ;

"rules" means rules made under paragraph twenty³ of the fifth schedule to the Act ;

"sign" in relation to a person who is unable to write his name means authenticate in such manner as may be prescribed ;

"oath" includes affirmation.

¹ In Burma "The Government of Burma".

² For words in brackets substitute "the" in Burma Order.

³ In Burma "fifteen of the third schedule".

¹ (2) The provisions of parts II and III of this Order shall, in relation to constituencies in which seats are reserved for candidates of any particular class, or in which the final voting is by members of an electoral college previously constituted for that purpose, have effect with such exceptions and subject to such adaptations and modifications as may be prescribed, but subject as aforesaid, any primary election for the purpose of electing candidates for reserved seats, or of constituting any such electoral college, shall be deemed to be part of the election of persons to fill the seats to be filled in the constituency.

(3) Where under any of the provisions of this Order anything is to be prescribed, different provision may be made for different cases or classes of cases.

(4) Any reference in this Order to any of the provisions of any ² Indian Act shall be construed as a reference to those provisions as amended by or under any other Act or, if those provisions are repealed and re-enacted with or without modification, to the provisions so re-enacted.

(5) Anything which under the provisions of the Act or of this Order is required or authorized to be done by, to or before the ³ Governor of a Province in connection with any matters to which this Order relates (whether or not the Governor is to act in his discretion or to exercise his individual judgment) shall before the commencement [of part III] ⁴ of the Act be done by, to or before the Governor in Council or, in the case of Sind or Orissa, the Governor.

PART II

ELECTION AGENTS AND EXPENSES

1. Every person nominated as a candidate at an election shall at the prescribed time and in the prescribed manner appoint either himself or some one other person to be his election agent.

2. No person shall be appointed an election agent who is disqualified from being an election agent under the subsequent provisions of this Order.

3. (1) Any revocation of the appointment of an election agent, whether he be the candidate himself or not, shall be signed by the candidate, and shall operate from the date on which it is lodged with the returning officer.

(2) In the event of such a revocation or of the death of an election agent, whether that event occurs before or during the election, or after the election but before a return of the candidate's election expenses has

¹ Sub-paragraph (2) is omitted from the Burma Order.

² The Burma Order omits the word "Indian".

³ The Burma Order refers to "the Governor of Burma".

⁴ The Burma Order omits the words in brackets.

been lodged in accordance with the provisions of the next but one succeeding paragraph, the candidate shall appoint forthwith either himself or some other person to be his election agent, and shall give notice in writing of the appointment to the returning officer.

4. Every election agent shall, for each election for which he is appointed election agent, keep separate and regular books of account, and shall enter therein such particulars of expenditure in connection with the election as may be prescribed.

5. (1) Within the prescribed time after every election there shall be lodged with the returning officer in respect of each person who has been nominated as a candidate a return of the election expenses of that person signed both by him and his election agent.

(2) Every such return shall be in such form and shall contain such particulars as may be prescribed, and shall be accompanied by declarations in the prescribed form by the candidate and his election agent made on oath before a magistrate.

(3) Notwithstanding anything in this paragraph, where a candidate is owing to absence from India¹ unable to sign the return of election expenses and to make the required declaration, the return shall be signed and lodged by the election agent only and shall be accompanied by a declaration by the election agent only, and the candidate shall within fourteen days after his return to India cause to be lodged with the returning officer a declaration made on oath before a magistrate in such form as may be prescribed.

6. ²[In each Province] provision shall be made, by an Act of the Provincial Legislature or by rules, fixing the maximum scales of election expenses at elections and the numbers and descriptions of persons who may be employed for payment in connection with elections :

Provided that no provision need be so made [in any Province] with respect to any election held before the expiration of two years from the commencement [of part III] of the Act.

7. Except so far as may be prescribed, this part of this Order does not apply to an election ³ by the members of a Provincial Legislative Assembly to fill seats in the Provincial Legislative Council.

PART III

DECISION OF DOUBTS AND DISPUTES AS TO THE VALIDITY OF AN ELECTION AND DISQUALIFICATIONS FOR CORRUPT PRACTICES

1. In this part of this Order and in the first schedule to this Order, except where it is otherwise expressly provided or the context otherwise requires—

1 "Burma" in the Burma Order.

2 Omit words in brackets in Burma Order.

3 In Burma Order "Elections to the Senate".

“agent” includes an election agent and any person who, on the trial of an election petition, is held by the Commissioners to have acted as an agent in connection with the election with the knowledge or consent of the candidate ;

“candidate” means a person who has been or claims to have been duly nominated as a candidate at any election, and a candidate who, with the election in prospect, has held himself out as a prospective candidate, shall be deemed to have been a candidate as from the time when he began so to hold himself out ;

“electoral right” means the right of a person to stand or not to stand as, or to withdraw from being, a candidate, or to vote or refrain from voting at an election ;

“returned candidate” means a candidate whose name has been published in the prescribed manner as duly elected ;

“corrupt practice”, in relation to an election by the members of a Provincial Legislative Assembly to fill seats in the Provincial Legislative Council,¹ means one of the practices specified in parts I and II of the first schedule to this Order, and in relation to any other election, means one of the practices specified in parts I, II and III of that schedule.

2. No election shall be called in question except by an election petition presented in accordance with the provisions of this part of this Order.

3. (1) An election petition against any returned candidate may be presented to the Governor—

(a) by any candidate or elector on any ground ;

(b) by an officer empowered in that behalf by the Governor, exercising his individual judgment, on the ground that the election has not been a free election by reason of the large number of cases in which undue influence or bribery has been exercised or committed.

In this paragraph, “elector”, in relation to a commerce and industry, mining or planting constituency, includes all the persons included in the electoral roll as the nominees of any body, notwithstanding that only one of them is entitled to vote.

(2) A petitioner may, if he so desires, in addition to calling in question the election of the returned candidate, claim a declaration that he himself has been duly elected, but such a declaration shall only be claimed on one or other of the following grounds—

(a) that in fact the petitioner received a majority of the valid votes ; or

¹ In Burma Order “In relation to elections to the Senate.”

(b) that but for votes obtained for the returned candidate by corrupt practices, the petitioner would have obtained a majority of the valid votes.

4. (1) Unless the Governor, exercising his individual judgment, dismisses a petition for non-compliance with the prescribed requirements, he shall, exercising his individual judgment, appoint as Commissioners for the trial of the petition three persons who are or have been, or are eligible to be appointed, judges of a High Court, and shall appoint one of them to be the president :

Provided that nothing in this sub-paragraph shall be deemed to prevent the appointment of the president of a Commission before the other Commissioners are appointed.

(2) Subject to the provisions of this paragraph, all applications and proceedings in connection with the petition shall be dealt with by, and carried on by or before, the Commissioners.

(3) Where in respect of an election in a constituency more petitions than one are presented, the Governor shall refer all those petitions to the same Commissioners, who may at their discretion inquire into the petitions either separately or in one or more groups, as they think fit.

(4) If the services of any Commissioners are not available for the purposes of the inquiry or if during the course of the inquiry any Commissioner is unable to continue to attend thereat, the Governor, exercising his individual judgment, shall appoint another Commissioner and the inquiry shall recommence before the Commission as so reconstituted :

Provided that the Commissioners may direct that any evidence already recorded shall remain upon record, and in that case it shall not be necessary to re-examine those witnesses who have already been examined and discharged.

(5) References to the Commissioners in this part of this Order shall, as respects any matter to be done before the commencement of the inquiry, be deemed to be references to the president.

5. When at an inquiry into an election petition the Commissioners so order, the Advocate-General of the Province, or some person acting under his instructions, shall attend and shall take such part therein as the Commissioners may direct.

6. Subject to the provisions of this part of this Order, Acts of the Provincial Legislature and rules may regulate the form of election petitions, the time and manner in which they are to be presented, the persons who are to be made parties thereto, the procedure to be adopted in connection therewith and the circumstances in which petitions are to abate, or may be withdrawn, and in which new petitioners may be substituted, may require security to be given for costs and may authorize

the Governor, exercising his individual judgment, to dismiss petitions for non-compliance with the prescribed requirements.

7. (1) Subject to the provisions of this paragraph, if in the opinion of the Commissioners—

- (a) the election of a returned candidate has been procured or induced, or the result of the election has been materially affected, by any corrupt practice ; or
- (b) any corrupt practice specified in part I of the first schedule to this Order has been committed in the interests of a returned candidate ; or
- (c) the result of the election has been materially affected by the improper acceptance or rejection of any nomination, or by reason of the fact that any person nominated was not qualified or was disqualified for election, or by the improper reception or refusal of a vote, or by the reception of any vote which is void, or by any non-compliance with the provisions of the Act or of this Order, or of any Act of the Provincial Legislature or rules relating to the election, or by any mistake in the use of any prescribed form ; or
- (d) the election has not been a free election by reason of the large number of cases in which bribery or undue influence has been exercised or committed,

the election of the returned candidate shall be void.

(2) If the Commissioners report that a returned candidate has been guilty by an agent, other than his election agent, of any corrupt practice specified in part I of the first schedule to this Order, but further report that the candidate has satisfied them that—

- (a) no corrupt practice was committed at the election by the candidate or his election agent, and the corrupt practices mentioned in the report were committed contrary to the orders, and without the sanction or connivance, of the candidate or his election agent ;
- (b) the candidate and his election agent took all reasonable means for preventing the commission of corrupt practices at the election ;
- (c) the corrupt practices mentioned in the report were of a trivial, and limited character or took the form of customary hospitality which did not affect the result of the election ; and
- (d) in all other respects the election was free from any corrupt practice on the part of the candidate or any of his agents,

then the Commissioners may find that the election of the candidate is not void.

¹ (3) If a person (not being entitled so to do) votes more than once at the same election, all his votes shall be deemed for the purposes of this paragraph to be void.

8. (1) At the conclusion of the inquiry the Commissioners shall report whether the returned candidate, or any person who has lodged a petition and claimed a seat, has been duly elected and in so reporting shall have regard to the provisions of the last preceding paragraph.

(2) The report shall further include a recommendation by the Commissioners as to the total amount of costs which are payable and the persons by and to whom the costs should be paid, and any such recommendation may include a recommendation for the payment of costs to the Advocate-General of the province or a person acting under his instructions attending the trial in pursuance of an order of the Commissioners.

(3) The report shall be signed by all the Commissioners and the Commissioners shall forthwith forward their report to the Governor, who on receipt thereof shall issue orders in accordance with the report and publish the report in the Government Gazette of the province, and the orders of the Governor shall be final.

9. If either in their report or upon any other matter there is a difference of opinion among the Commissioners, the opinion of the majority shall prevail and their report shall be expressed in terms of the views of the majority.

10. Where any charge is made in an election petition of any corrupt practice, the Commissioners shall record in their report—

- (a) a finding whether a corrupt practice has or has not been proved to have been committed by any candidate or his agent, or with the connivance of any candidate or his agent, and the nature of that corrupt practice ; and
- (b) the names of all persons, if any, who have been proved at the inquiry to have been guilty of any corrupt practice and the nature of that practice with any such recommendations as the Commissioners may think proper to make for the exemption of any persons from any disqualifications which they may have incurred in this connection under paragraphs two to five of part IV of this Order :

Provided that no person shall be so named in the report unless he has been given a reasonable opportunity of showing cause why his name should not be so recorded.

PART IV

DISQUALIFICATIONS

1. The offences and practices specified, in relation to certain elections, in the second schedule to this Order shall, for the periods

¹ The words in brackets are omitted from the Burma Order.

respectively specified in relation to those offences and practices in that schedule, entail disqualification for membership of [any Provincial] ¹ Legislature.

2. If any person—

(a) is, [in connection with an election to a Provincial Legislature, the Coorg Legislative Council or a local body in British India,]² convicted of an offence under chapter IXA of the Indian Penal Code punishable with imprisonment for a term exceeding six months; or

(b) is after an inquiry under part III of this Order reported as guilty of any such corrupt practice as is specified in part I or part II of the first schedule to this Order,

he shall, for a period of six years from the date of the conviction or report, be disqualified for voting at any election.

3. If, in relation to any election (other than an election by the members of a Provincial Legislative Assembly to fill seats in the Provincial Legislative Council),³ any person is after such an inquiry as aforesaid reported as guilty of any such corrupt practice as is specified in part III of the said Schedule he shall be disqualified for voting at any election for a period of four years from the date of the report.

4. Where under either of the two last preceding paragraphs a person is, in connection with an election in a commerce and industry, [mining or planting]⁴ constituency, disqualified for voting for any period, then, if that person was at the date of the election either—

(a) included in the electoral roll for the constituency as the nominee of a firm, Hindu⁵ joint family or corporation, entitled to nominate persons for inclusion therein; or

(b) a member of any such firm or Hindu⁶ joint family, or a director, managing agent or manager of any such corporation, or a person authorised to sign the name of any such firm, Hindu joint family or corporation in the ordinary course of its business,

the firm, family or corporation shall, for the like period, be disqualified from nominating persons for inclusion in the electoral roll of any [commerce and industry, mining or planting]⁶ constituency.

5. If default is made in making the return of the election expenses of any person who has been nominated as a candidate at an election to

¹ For words in brackets substitute "the" in Burma Order.

² The Burma Order omits words in brackets and adds "in Burma" after the word "convicted".

³ In Burma Order "(other than an election to the Senate)."

⁴ Burma Order omits the words in brackets.

⁵ Burma Order omits reference to "Hindu joint family".

⁶ For words in brackets substitute "such" in Burma Order.

which Part II of this Order applies, or if such a return is found, either by Commissioners holding an inquiry into the election or by any court in a judicial proceeding, to be false in any material particular, the candidate and his election agent shall be disqualified for voting at any election for a period of five years from the date by which a return was required to be lodged.

6. Every person shall be disqualified for voting at any election who is for the time being disqualified for voting at elections to the federal legislature by reason of misconduct in connection with an election to that legislature, or by reason of a default in making, or of the falsity of, any return of election expenses at any election to that legislature.

References in this paragraph to the federal legislature shall until the establishment of the federation be construed as references to the Indian legislature.

7. Any person who is for the time being disqualified under the foregoing provisions of this part of this Order for being a member of a provincial legislature, or for voting at elections, shall, so long as the disqualification exists, also be disqualified for being an election agent at any election.

8. Any disqualification under paragraphs two to five of this part of this Order¹ arising in connection with an election to the Legislature of, or to a local body in, a province may be removed by the Governor of that province in his discretion, and any other disqualification under the said paragraph two may be removed, before the establishment of the federation, by the Governor-General in Council, and, after the establishment of the federation, by the Governor-General in his discretion.

9. In paragraph one of this part of this Order, "elections" includes all the elections referred to in the second schedule to this Order, but save as aforesaid, the references in this part of this Order to elections, [other than express references to elections of any other kind],² shall be construed as references to elections as defined in paragraph three of part I of this Order.

Paragraph 6 is omitted from Burma Order.

¹ The Burma Order "may be removed by the Governor in his discretion".

² The words in brackets are omitted in the Burma Order.

FIRST SCHEDULE

CORRUPT PRACTICES

PART I

1. Bribery, that is to say, any gift, offer or promise by a candidate or his agent, or by any other person with the connivance of a candidate or his agent, of any gratification to any person whomsoever, with the object, directly or indirectly, of inducing—

- (a) a person to stand or not to stand as, or to withdraw from being, a candidate at an election ; or
- (b) an elector to vote or refrain from voting at an election, or as a reward to—
 - (i) a person for having so stood or not stood, or for having withdrawn his candidature ; or
 - (ii) an elector for having voted or refrained from voting.

For the purposes of this paragraph the term “gratification” is not restricted to pecuniary gratifications or gratifications estimable in money, and it includes all forms of entertainment and all forms of employment for reward ; but it does not include the payment of any expenses *bona fide* incurred at, or for the purpose of, any election and duly entered in the return of election expenses prescribed by this Order.

2. Undue influence, that is to say, any direct or indirect interference or attempt to interfere on the part of a candidate or his agent, or of any other person with the connivance of the candidate or his agent, with the free exercise of any electoral right :

Provided that—

- (a) without prejudice to the generality of the provisions of this paragraph, any such person as is referred to therein who—
 - (i) threatens any candidate or elector, or any person in whom a candidate or elector is interested, with any injury of any kind ; or
 - (ii) induces or attempts to induce a candidate or elector to believe that he, or any person in whom he is interested, will become or will be rendered an object of divine displeasure or spiritual censure,
 shall be deemed to interfere with the free exercise of the electoral right of that candidate or elector within the meaning of this paragraph ;
- (b) a declaration of public policy, or a promise of public action, or the mere exercise of a legal right without intent to interfere with an electoral right, shall not be deemed to be interference within the meaning of this paragraph.

3. The procuring or abetting or attempting to procure by a candidate or his agent, or by any other person with the connivance of a candidate or his agent, the application by a person for a voting paper in the name

of any other person, whether living or dead, or in a fictitious name, or by a person for a voting paper in his own name when, by reason of the fact that he has already voted in the same or some other constituency, he is not entitled to vote.

4. The removal of a voting paper from the polling station during polling hours by any person with the connivance of a candidate or his agent.

5. The publication by a candidate or his agent, or by any other person with the connivance of the candidate or his agent, of any statement of fact which is false, and which he either believes to be false or does not believe to be true, in relation to the personal character or conduct of any candidate, or in relation to the candidature or withdrawal of any candidate, being a statement reasonably calculated to, prejudice the prospects of that candidate's election.

6. The incurring or authorising by a candidate or his agent of expenditure, or the employment of any person by a candidate or his agent, in contravention of this Order or of any Act of the Provincial Legislature or Rules.

PART II

1. Any act specified in Part I of this Schedule, when done by a person who is not a candidate or his agent or a person acting with the connivance of a candidate or his agent.

2. The application by a person at an election for a voting paper in the name of any other person, whether living or dead, or in a fictitious name, or for a voting paper in his own name when, by reason of the fact that he has already voted in the same or some other constituency, he is not entitled to vote.

3. The receipt of, or agreement to receive, any gratification whether as a motive or a reward—

(a) by a person for standing or not standing as, or for withdrawing from being, a candidate; or

(b) by any person whomsoever for himself or any other person for voting or refraining from voting, or for inducing or attempting to induce any elector to vote or refrain from voting, or any candidate to withdraw his candidature.

For the purposes of this paragraph the term "gratification" has the same meaning as it has for the purposes of paragraph one of Part I of this Schedule.

4. The making of any return of election expenses which is false in any material particular, or the making of a declaration verifying any such return.

PART III

1. The incurring or authorisation by any person other than a candidate or his agent of expenses on account of holding any public meeting, or upon any advertisement, circular or publication, or in any other way whatsoever, for the purpose of promoting or procuring the election of the candidate, unless he is authorised in writing so to do by the candidate.

2. The hiring, using or letting, as a committee room or for the purpose of any meeting to which electors are admitted, of any building, room or other place where intoxicating liquor is sold to the public.

3. The issuing of any circular, placard or poster having a reference to the election which does not bear on its face the name and address of the printer and publisher thereof.

The Burma Order includes as paragraphs 1 and 2 of Part III the following :—

1. Any payment or promise of payment to any person whomsoever on account of the conveyance of any elector, (not being the person, or the spouse of the person, making or promising to make the payment) to or from, any place for the purpose of recording his vote.

2. The hiring, employment, borrowing or using for the purposes of the election of any boat, vehicle or animal usually kept for letting on hire or for the conveyance of passengers by hire :

Provided that any elector may hire any boat, vehicle or animal, or use any boat, vehicle or animal to convey himself or his spouse to or from the place where the vote is recorded.

SECOND SCHEDULE

DISQUALIFICATIONS FOR MEMBERSHIP OF PROVINCIAL LEGISLATURES

Election	Offence or Corrupt Practice	Period of Disqualification
Elections to which Chapter IXA of the Indian Penal Code applies	Offences under Chapter IXA of the Indian Penal Code punishable with imprisonment for a term exceeding six months.	Six years from the date of conviction.
Elections as defined in paragraph three of Part I of this Order.	Corrupt practices specified in Parts I and II of the First Schedule to this Order	Six years from the date of the report of the tribunal holding the inquiry
Elections as defined in paragraph three of Part I of this Order, other than elections by the members of a Provincial Legislative Assembly to fill seats in the Provincial Legislative Council.	Corrupt practices specified in Part III of the First Schedule to this Order	Four years from the date of the report of the tribunal holding the inquiry.
Elections to Federal Legislature. ¹	Corrupt practices as defined in any Order under the Act relating to such elections.	The period for which the corrupt practice entails disqualification for membership of Federal Legislature.
Elections under the Government of India Act.	Any corrupt practice within the meaning of the Electoral Rules under the Government of India Act relating to the election in question.	Such period, commencing on the date of the report of the Commissioners under the Electoral Rules relating to the election in question, as is the maximum period of disqualification specified in those Rules for inclusion in electoral rolls thereunder.

¹ The Burma Order omits reference to the elections to the Federal Legislature.

APPENDIX II.

WOODWARD v. SARSONS.

WOODWARD v. SARSONS.

In 1876 a Select Committee appointed by the House of Commons 'to enquire into the working of the existing machinery of Parliamentary and Municipal Elections' unanimously recommended that the Home Office should forward to every Returning Officer the case and judgment in Woodward v. Sarsons.

Note.—Rule 24 under the Ballot Act, 1872, requires that 'immediately before a ballot paper is delivered to an elector it shall be marked on both sides with the official mark, either stamped or perforated'. The Indian regulations 16 and 31 (a) contemplate a mark only on the back of the ballot paper.

Lord Coleridge, C. J.—In this case a petition had been presented praying that the election of the respondent, Mr. Sarsons, to the office of town councillor should be declared void, and a case was stated for the opinion of the court. At the election the petitioner Woodward and the respondent Sarsons were the candidates, and the respondent Sadler was the alderman of the ward and returning officer. The returning officer appointed one Smith to be his presiding officer at polling station No. 130. Upon the electors applying for a ballot paper at such station, the presiding officer marked upon the face of the ballot paper given to each of them the number of the voter appearing on the burgess roll. This he did to every ballot paper handed out by him. The number of ballot papers so marked and given out by him was 294, of which 234 were given in favour of the petitioner Woodward and 60 in favour of the respondent Sarsons. The burgess roll numbers so marked were, in fact, not seen so as to be identified, but they could have been seen by the persons present at the counting of the ballot papers. At polling station No. 125 about 20 ballot papers were marked by the presiding officer by the direction of voters who were unable to read. Each of such ballot papers was placed by the presiding officer in the ballot box wrapped up in the declaration of inability to read, made by the voter for whom such vote was marked. Each of the votes so given and so marked by the presiding officer could have been, but was not in fact, identified by the returning officer at the counting of the votes by comparing the ballot papers with the declarations of inability in which they were wrapped. Twenty-two ballot papers, which had been counted as valid, were, on inspection after the presentation of the petition, found to be marked in a manner to which objection was now taken. It was contended that they ought

all to have been rejected. The returning officer declared at the election the numbers of votes thus :

For Sarsons	..	..	..	..	965
For Woodward	..	..	..	..	775
					<hr/>
Majority for Sarsons	..	..	..	..	190

and thereupon he declared Sarsons, the respondent, to be duly elected.

The petition, without praying for a scrutiny, prayed that it might be determined that the said H. Sarsons was not duly elected, and that the election was void.

Upon these facts it was argued, on behalf of the petitioner, that the election was void, because it had not been conducted in accordance with the Ballot Act ; that it was void on that account according to the common law of Parliament, because the deviation from the Act was so great that the election could not be said to be an election by ballot ; that it was void under the Ballot Act itself according to section 13, because it had not been conducted according to the rules in the schedules, nor in accordance with the principles laid down in the body of the Act, and the non-compliance with the principles of the Act had affected the result of the election. And as to the last allegation, it was said that the petitioner was not bound, in order to prove it, to show that on a scrutiny the respondent would be in a minority, but it was enough if he could show that so large a body of electors as those who did vote or who might have voted at the polling station No. 130 were or might have been virtually disfranchised.

On behalf of the respondents it was urged that the admitted error of the presiding officer at the polling station No. 130 was not of sufficient importance to avoid the election at common law, because the election was, notwithstanding such error, substantially conducted as an election by ballot ; that in this case it could be demonstrated that the mistake relied on had not affected the result of the election ; that a breach of the Ballot Act, however extensive, cannot as such avoid an election, for there is no enactment in the Act to that effect ; that no such enactment is contained in section 13 ; that it is an enactment to save certain elections, and not to invalidate any ; that it is an enactment of extreme caution stating as law that which was equally the law before. Arguments were then gone into as to the alleged validity and invalidity of different classes of votes which had been counted. This was not done as by way of scrutiny, but in order to determine whether the alleged mistakes had or had not affected the result of the election.

The questions raised for decision seem to be, first, what is the true statement of the rule under which an election may be avoided by the common law of Parliament ? secondly, is the present case brought within

the rule ? thirdly, whether a breach of the Ballot Act can as such be a ground for avoiding an election ? fourthly, if yes ; can this election be thereby avoided ?

As to the first, we are of opinion that the true statement is that an election is to be declared void by the common law applicable to Parliamentary elections if it was so conducted that the tribunal which is asked to avoid it is satisfied, as a matter of fact, either that there was no real electing at all, or that the election was not really conducted under the subsisting election laws. As to the first, the tribunal should be so satisfied, i.e. that there was no real electing by the constituency at all, if it were proved to its satisfaction that the constituency had not in fact had a fair and free opportunity of electing the candidate which the majority might prefer. This would certainly be so, if a majority of the electors were proved to have been prevented from recording their votes effectively according to their own preference, by general corruption or general intimidation, or by being prevented from voting by want of the machinery necessary for so voting, as by polling stations being demolished or not opened, or by other of the means of voting according to law not being supplied, or supplied with such errors as to render the voting, by means of them, void or by fraudulent counting of votes or false declaration of numbers by a returning officer, or by other such acts or mishaps. And we think that the same result should follow if, by reason of any such or similar mishaps, the tribunal, without being able to say that a majority had been prevented, should be satisfied that there was reasonable ground to believe that a majority of the electors may have been prevented from electing the candidate they preferred. But if the tribunal should only be satisfied that certain of such mishaps had occurred, but should not be satisfied either that a majority had been, or that there was reasonable ground to believe that a majority might have been, prevented from electing the candidate they preferred, then we think that the existence of such mishaps would not entitle the tribunal to declare the election void by the common law of Parliament. This, we think, is the result of comparing the judgments of Grove, J., at Hackney and Dudley with the judgments of Martin, B., at Salford, and of Mellor, J., at Bolton, all which judgments are in accordance with, but express more accurately the grounds of, the decisions in Parliament in the older cases of the Norfolk, Morpeth, Pontefract, Coventry, New Ross, and Drogheda, all, which are mentioned in *Rogers on Elections*, 11th Ed., pp. 392, 393. As to the second, i.e. that the election was not really conducted under the subsisting election laws at all, though there was an election in the sense of there having been an election by the will of the constituency, we think that the question must in like manner be whether the departure from the prescribed method of election is so great that the tribunal is satisfied as matter of fact that

the election was not an election under the existing laws. It is not enough to say that great mistakes were made in carrying out the election under those laws; it is necessary to be able to say that either wilfully or erroneously the election was not carried out under those laws, but under some other method. For instance, if, during the time of the old laws, with the consent of a whole constituency, a candidate had been selected by tossing up a coin, or by the result of a horse race, it might well have been said that the electors had exercised their free will, but it should have been held that they had exercised it under a law of their own invention, and not under the existing election laws, which prescribed an election by voting. So now, where the election is to be an election by ballot, if either wilfully or erroneously a whole constituency were to vote, but not by ballot at all, the election would be a free exercise of their will, but it would not be an election by ballot, and therefore not an election under the existing election law. But, if, in the opinion of the tribunal, the election was substantially an election by ballot, then no mistakes or misconduct, however great, in the use of the machinery of the Ballot Act, could justify the tribunal in declaring the election void by the common law of Parliament. We agree upon this point with the answer attributed to Martin, B., before a Committee of the House of Commons, with his decision at Salford, and with the decisions of Mellor, J., at Bolton, and of Berry, J., at Drogheda.

If the rule be thus stated, then the next question is, whether we can say, upon the facts stated in the present case, that a majority of the electors have been, or that there is reasonable ground to believe that a majority may have been, by misconduct or error of the presiding officers, prevented from recording their votes with effect. Now there is no evidence, as it seems to us, that any elector was prevented from recording his vote, or induced not to record it, by what occurred. All who went to vote at the polling station No. 130 did vote. It was argued that a report of the error being then perpetrated might have prevented others from going to vote, but this was answered by showing that the court finds that no one noticed the error until after the election was over.

The result is that all the electors who desired to vote did vote; and as to the votes which were given, and which are objected to, it is now known (except as to the twenty) for whom each of them was in fact given. In this case, therefore, where the objections to the particular votes have been determined, the effect of the mistakes on the result of the election will be exactly known. If so, there is no room for speculation or doubt as to whether a majority may or may not have been prevented from voting with effect. Those who did not vote were not prevented by the errors which occurred; it will be seen how the majority of those who did vote was affected by such errors. In this case, therefore, it becomes necessary, not by way of scrutiny, but in order to determine

whether the majority has been prevented from voting with effect to determine upon the validity or invalidity of the votes which were given, and to which objection has been taken. In order to determine this part of the case, it is necessary to consider and determine the construction of the Ballot Act. Now, first, the Act is divided into the principal part which contains certain sections, and two schedules which contain certain rules and forms ; and by section 28, ' The schedules and the notes thereto and directions therein shall be construed and have effect as part of this Act '. The rules and forms, therefore, are to be construed as part of the Act, but are spoken of as containing ' directions '. Comparing the sections and the notes thereto it will be seen that, for the most part, if not invariably, the rules point out the mode or manner of doing what the section enacts shall be done. And in Schedule 2, the first note states, ' The forms contained in this schedule or forms as nearly resembling the same as circumstances will admit shall be used '. And in the ballot paper, as given in the schedule, is ' *Directions* as to printing ballot paper ', and ' *Form of directions for the guidance of voters in voting, etc.* '. These observations lead us to the conclusion that the enactments, as to the rules in the first schedule, and the forms in the second are directory enactments as distinguished from the absolute enactments in the sections in the body of the Act. And in such case, in order to determine the preliminary question, which is, whether there has been a material breach of the Act, and which must be determined before determining what effect such breach has upon a vote on the election, the general rule is that an absolute enactment must be obeyed or fulfilled exactly, but it is sufficient if a directory enactment be obeyed or fulfilled substantially.

The 2nd section enacts, as to what the voter shall do, that ' That voter having secretly marked his vote on the paper and folded it up so as to conceal his vote, shall place it in an enclosed box '. This is all that is said in the body of the Act about what the voter shall do with the ballot paper. That which is absolute, therefore, is that the voter shall mark his paper *secretly*. How he shall mark it is in the directory part of the statute. By rule 25, ' The elector, on receiving the ballot paper, shall forthwith proceed into one of the compartments in the polling station, and there *mark his paper*, and fold it up so as to conceal his vote, and shall then put his ballot paper so folded up into the ballot box '. This rule, it will be observed, does not yet say how the paper is to be marked. But in Schedule 2 is given the ' form of ballot paper ', and appended to this form is a note, which, by the 28th section, is to be construed and have effect as part of the Act. This note contains the form of directions for the guidance of the voter in voting. ' The voter will go into one of the compartments, and with the pencil provided in the compartment place a cross on the right hand side, opposite the name of each candidate for whom he votes, thus x '. This is the only enactment

throughout the statute as to the manner and form in which the voter is to mark his ballot paper. And therefore, by the general rule before mentioned, it would be necessary that the absolute enactment that the paper should be marked secretly should be obeyed exactly, but it would be sufficient that the manner of marking the paper should be obeyed substantially. If these two enactments be so obeyed, there is no material breach of the Act. The extent of error, which is to vitiate so as to annul the ballot paper, is further to be gathered from the statute itself. By section 2, 'Any ballot paper which has not on its back the official mark, or on which votes are given to more candidates than the voter is entitled to vote for, or on which anything except the said number on the back is written or marked "by which the voter can be identified, shall be void, and not counted'. It is not every writing or every mark, besides the number on the back, which is to make the paper void, but only such a writing or mark as is one by which the voter can be identified. So in rule 36, 'The Returning Officer shall report, &c., the number of ballot papers rejected, and not counted by him under the several heads of, first, want of official mark; secondly, voting for more candidates than entitled to; thirdly, writing or mark by which voter could be identified; fourthly, unmarked or void for uncertainty'. And then in Schedule 2 in the note to the form above referred to, we have this warning, 'If the voter votes for more than candidates, or places any mark on the paper by which he may be afterwards identified, his ballot paper will be void, and will not be counted'. The result seems to be, as to writing or mark on the ballot paper, that if there be substantially a want of any mark, or a mark which leaves it uncertain whether the voter intended to vote at all, or for which candidate he intended to vote, or if there be marks indicating that the voter has voted for too many candidates, or a writing or a mark by which the voter can be identified, then the ballot paper is void, and is not to be counted. Or to put the matter affirmatively, the paper must be marked so as to show that the voter intended to vote for some one, and so as to show for which of the candidates he intended to vote. It must not be marked so as to show that he intended to vote for more candidates than he was entitled to vote for, nor so as to leave it uncertain whether he intended to vote at all, or for which candidate he intended to vote, nor so as to make it possible, by seeing the paper itself, or by reference to other available facts to identify the way in which he has voted.

If these requirements are substantially fulfilled, then there is no enactment and no rule of law by which a ballot paper can be treated as void, though the other directions in the statute are not strictly obeyed. If these requirements are not substantially fulfilled, the ballot paper is void, and should not be counted: and if it is counted, it should be struck out on a scrutiny. The decision in each case is upon a point of fact to

be decided, first, by the returning officer, and afterwards, by the election tribunal on petition.

Applying these views to the votes in question before us, it is clear that the 294 ballot papers marked by the presiding officer at the polling station No. 130 were void, and ought not to be counted. There was a mark on them by which, on reference to the burgess roll, the way in which the voter had voted could be identified.

As to the 20 ballot papers at the polling station No. 125, there was a breach by the presiding officer of the directions in rule 26, but there was no breach for which by any enactment the ballot papers can be rejected. The votes were given in the way prescribed, but the presiding officer dealt with the declarations erroneously. We are of opinion that those votes were properly counted. As to the ballot papers in Appendix A, No. 638 is clearly void, and must be disallowed. We, with some hesitation, disallow Nos. 844 and 889. There is no cross at all, and we yield to the suggested rule that the writing by the voter of the name of the candidate may give too much facility, by reason of the handwriting, to identify the voter. But we cannot think that the mere fact of two crosses being placed, as in 433 or as in 928, ought to vitiate the ballot paper. There can be no doubt as to the intention to vote, and no doubt as to the intention to vote emphatically for the one candidate. If there were evidence of an arrangement that the voter to indicate that it was he that voted, who had used the ballot paper, then, by reason of such evidence, such double mark would be a mark by which the voter could be identified, and then the paper, upon such proof being made, should be rejected. But the mere fact of there being two such crosses is not, in our judgment, a substantial breach of the statute. Neither is the mere fact of an additional mark such as is found in 926, nor the mere facts of the peculiar form of cross in 1,364 and 641, nor the marks on 1, 726, 2,140, 3,562, or 911, though in these cases also, extrinsic evidence of arrangement might make such peculiarities indications of identity. We think that, inasmuch as the ballot paper was handed in by the voter as a vote, the mark on 875 substantially indicated that the voter intended to vote for the candidate against whose name it is placed, and that the paper ought to be allowed. And we think the same reasoning applied to 117, 155, 190, 505, 174, 183, 842, 1,413, in which the cross is placed on the left-hand side of the candidate's name, instead of on the right hand side. The substance of the direction in the note in Schedule 2 is fulfilled, which is, in our opinion, that the voter should clearly indicate the candidate for whom he intends to vote. If this be done substantially, and the absolute enactment as to secrecy be observed fully, we think the statute is satisfied. For the same reasons we, in Appendix B, disallow No. 410, but allow all the rest.

We are aware that in so applying the principles which we have deduced from the statute, we are acting apparently in opposition to some of the decisions in *Haswell v. Stewart* (*The Wigtown Case*), but there may have been evidence in that case which does not exist in the present, and which made many of the marks there marks of identification, which the mere presence of the marks here does not do. If this was not so, we respectfully differ from the strict view taken by the majority of the learned judges who decided that case, and adhere to the view of Lord Benholme given in that case. It follows from our decision as to the different ballot papers, that if the 60 which were given for Sarsons, but properly disallowed at the counting by the returning officer, had not been rendered void by the presiding officer, they would have made the votes for Sarsons 1,025, from which striking three disallowed papers in Appendix A, his numbers would have been 1,022; and adding the 234 for Woodward, but striking off one disallowed in Appendix B, his numbers would have been 1,008. The 20 being properly, in our opinion, allowed, do not affect the result. Inasmuch, however, as no voter was prevented from voting, it follows that the errors of the presiding officers at the polling stations No. 130 and No. 125, did not affect the result of the election, and did not prevent the majority of electors from effectively exercising their votes in favour of the candidate they preferred, and therefore that the election cannot be declared void by the common law applicable to Parliamentary elections.

But then it is urged that there has been a breach of the Ballot Act, and therefore the election is by virtue of the Act itself, void. This is the third question which was raised in argument before us. It is said section 13, though it is in a negative form, assumes, as an affirmative proposition, that a non-compliance with the rules or any mistake in the use of the forms would render an election invalid, unless it appeared that the election was conducted in accordance with the principles laid down in the body of the Act, and that such non-compliance or mistake did not affect the result of the election. If this proposition be closely examined, it will be found to be equivalent to this, that the non-observance of the rules or forms, which is to render the election invalid, must be so great as to amount to a conducting of the election in a manner contrary to the principle of an election by ballot, and must be so great as to satisfy the tribunal that it did affect or might have affected the majority of votes; or in other words, the result of the election. It, therefore, is, as has been said, 'an enactment *ex abundante cautela*', declaring that to be the law applicable to elections under the Ballot Act, which would have been the law to be applied, if that section had not existed. It follows that, for the same reasons which prevent us from holding that this election was void at common law, we must hold that it is not void under the statute.

As between the petitioner and the respondent Sarsons, we therefore hold that this petition must be dismissed with costs.

As between the petitioner and the respondent Sadler, we are of opinion that, inasmuch as there was no personal default by the respondent, and the result of the election was not affected, the petition must be dismissed ; each party to bear his own costs.

Petitions dismissed accordingly.

APPENDIX III.

**THE INDIAN ELECTIONS OFFENCES AND
INQUIRIES ACT, 1920**

THE INDIAN ELECTIONS OFFENCES AND INQUIRIES ACT, 1920.

(ACT No. XXXIX OF 1920.)

[PASSED BY THE INDIAN LEGISLATIVE COUNCIL]

(Received the assent of the Governor-General on the 14th September, 1920.)

An Act to provide for the punishment of malpractices in connexion with elections, and to make further provision for the conduct of inquiries in regard to disputed elections to legislative bodies constituted under the Government of India Act.

WHEREAS it is expedient to provide for the punishment of malpractices in connexion with elections, and to make further provision for the conduct of inquiries in regard to disputed elections to legislative bodies constituted under the Government of India Act; It is hereby enacted as follows :

PRELIMINARY

1.—(1) This Act may be called the Indian Elections Offences and Inquiries Act, 1920 ; and

(2) It extends to the whole of British India.

PART I

AMENDMENT OF THE INDIAN PENAL CODE AND CODE OF CRIMINAL PROCEDURE.

1.—(1) In Section 21 of the Indian Penal Code, after the tenth entry, the following shall be inserted, namely, ‘ *Eleventh* :—Every person who holds any office in virtue of which he is empowered to prepare, publish, maintain or revise an electoral roll or to conduct an election or part of an election ’ ; and after *Explanation* 2, the following shall be added namely :

‘ *Explanation* 3.—The word “ election ” denotes an election for the purpose of selecting members of any legislative, municipal or other public authority, of whatever character, the method of selection to which is by, or under, any law prescribed as by election ’.

(2) After Chapter IX of the same Code the following Chapter shall be inserted, namely :—

CHAPTER IXA

Of offences relating to elections.

171A. For the purposes of this Chapter—

(a) ‘ candidate ’ means a person who has been nominated as a candidate at any election, and includes a person who, when an election is

in contemplation, holds himself out as a prospective candidate thereat ; provided that he is subsequently nominated as a candidate at such election ;

(b) ' electoral right ' means the right of a person to stand, or not to stand as, or to withdraw from being, a candidate or to vote or refrain from voting at an election.

171B.—(1) Whoever—

- (i) gives a gratification to any person with the object of inducing him or any other person to exercise any electoral right or of rewarding any person for having exercised any such right ;
or
- (ii) accepts either for himself or for any other person any gratification as a reward for exercising any such right or for inducing or attempting to induce any other person to exercise any such right,

commits the offence of bribery :

Provided that a declaration of public policy or a promise of public action shall not be an offence under this section.

(2) A person who offers, or agrees to give, or offers or attempts to procure, a gratification shall be deemed to give a gratification.

(3) A person who obtains or agrees to accept or attempts to obtain a gratification shall be deemed to accept a gratification, and a person who accepts a gratification as a motive for doing what he does not intend to do, or as a reward for doing what he has not done, shall be deemed to have accepted the gratification as a reward.

171C.—(1) Whoever voluntarily interferes or attempts to interfere with the free exercise of any electoral right commits the offence of undue influence at an election.

(2) Without prejudice to the generality of the provisions of sub-section (1), whoever—

- (a) threatens any candidate or voter, or any person in whom a candidate or voter is interested, with injury of any kind,
or
- (b) induces or attempts to induce a candidate or voter to believe that he or any person in whom he is interested will become or will be rendered an object of Divine displeasure or of spiritual censure,

shall be deemed to interfere with the free exercise of the electoral right of such candidate or voter, within the meaning of sub-section (1).

(3) A declaration of public policy or a promise of public action, or the mere exercise of a legal right without intent to interfere with an electoral right, shall not be deemed to be interference within the meaning of this section.

171D. Whoever at any election applies for a voting paper or votes in the name of any other person, whether living or dead, or in a fictitious name, or who having voted once at such election applies at the same election for a voting paper in his own name, and whoever abets, procures, or attempts to procure the voting by any person in any such way, commits the offence of personation at an election.

171E. Whoever commits the offence of bribery shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both :

Provided that bribery by treating shall be punished with fine only.

Explanation.—‘Treating’ means that form of bribery where the gratification consists in food, drink, entertainment, or provision.

171F. Whoever commits the offence of undue influence or personation at an election shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

171G. Whoever with intent to affect the result of an election makes or publishes any statement purporting to be a statement of fact which is false, and which he either knows or believes to be false or does not believe to be true, in relation to the personal character or conduct of any candidate shall be punished with fine.

171H. Whoever without the general or special authority in writing of a candidate incurs or authorizes expenses on account of the holding of any public meeting, or upon any advertisement, circular, or publication, or in any other way whatsoever for the purpose of promoting or procuring the election of such candidate, shall be punished with fine which may extend to five hundred rupees :

Provided that if any person having incurred any such expenses not exceeding the amount of ten rupees without authority obtains within ten days from the date on which such expenses were incurred the approval in writing of the candidate, he shall be deemed to have incurred such expenses with the authority of the candidate.

171I. Whoever being required by any law for the time being in force or any rule having the force of law to keep accounts of expenses incurred at or in connexion with an election fails to keep such accounts shall be punished with fine which may extend to five hundred rupees.

3.—(1) In Section 196 of the Code of Criminal Procedure, 1898, after the words ‘Chapter VI’ the words ‘or IXA’ shall be inserted.

(2) In Schedule II to the same Code after the entries relating to Chapter IX of the Indian Penal Code the following shall be added, namely :

CHAPTER IXA—OFFENCES RELATING TO ELECTIONS

171 E	Bribery . .	Shall not arrest without warrant.	Summons	Bailable.	Not compoundable.	Imprisonment of either description for one year, or fine, or both, or if treating only, fine only.	Presidency Magistrate or Magistrate of the First Class
171 F	Undue influence and personation at an election.	do.	do.	do.	do.	Imprisonment of either description for one year, or fine, or both.	do.
171 G	False statement in connexion with an election.	do.	do.	do.	do.	Fine . . .	do.
171 H	Illegal payments in connexion with elections.	do.	do.	do.	do.	Fine of 500 rupees.	do.
171 I	Failure to keep election accounts.	do.	do.	do.	do.	Fine of 500 rupees.	do.

PART II.

ELECTION INQUIRIES AND OTHER MATTERS

4. In this Part, unless there is anything repugnant in the subject or context,

- (a) 'costs' means all costs, charges, and expenses of, or incidental to, an inquiry ;
- (b) 'election' means an election to either Chamber of the Indian Legislature or to a Legislative Council constituted under the Government of India Act ;
- (c) 'inquiry' means an inquiry in respect of an election by Commissioners appointed for that purpose by the Governor-General, Governor, or Lieutenant-Governor ;
- (d) 'pleader' means any person entitled to appear and plead for another in a Civil Court, and includes an advocate, a vakil, and an attorney of a High Court.

5. Commissioners appointed to hold an inquiry shall have the powers which are vested in a Court under the Code of Civil Procedure, 1908, when trying a suit in respect of the following matters :

- (a) discovery and inspection,
- (b) enforcing the attendance of witnesses, and requiring the deposit of their expenses,
- (c) compelling the production of documents,
- (d) examining witnesses on oath,

- (e) granting adjournments,
- (f) reception of evidence taken on affidavit, and
- (g) issuing commissions for the examination of witnesses,

and may summon and examine *suo motu* any person whose evidence appears to them to be material; and shall be deemed to be a Civil Court within the meaning of Sections 480 and 482 of the Code of Criminal Procedure, 1898.

Explanation.—For the purposes of enforcing the attendance of witnesses, the local limits of the Commissioners' jurisdiction shall be the limits of the Province in which the election was held.

6. The provisions of the Indian Evidence Act, 1872, shall, subject to the provisions of this Act, be deemed to apply in all respects to an inquiry.

7. Notwithstanding anything in any enactment to the contrary, no document shall be inadmissible in evidence on the ground that it is not duly stamped or registered.

8.—(1) No witness shall be excused from answering any question as to any matter relevant to a matter in issue in an inquiry upon the ground that the answer to such question will criminate or may tend, directly or indirectly, to criminate him; or that it will expose, or tend, directly or indirectly, to expose him to a penalty or forfeiture of any kind:

Provided that

- (i) no person who has voted at an election shall be required to state for whom he has voted; and
- (ii) a witness who, in the opinion of the Commissioners, has answered truly all questions which he has been required by them to answer shall be entitled to receive a certificate of indemnity, and such certificate may be pleaded by such person in any Court and shall be deemed to be a full and complete defence to or upon any charge under Chapter IXA of the Indian Penal Code arising out of the matter to which such certificate relates, nor shall any such answer be admissible in evidence against him in any suit or other proceeding.

(2) Nothing in sub-section (1) shall be deemed to relieve a person receiving a certificate of indemnity from any disqualification in connection with an election imposed by any law or any rule having the force of law.

9. Any appearance, application, or act before the Commissioners may be made or done by the party in person or by a pleader duly appointed to act on his behalf:

Provided that any such appearance shall, if the Commissioners so direct, be made by the party in person.

10. The reasonable expenses incurred by any person in attending to give evidence may be allowed by the Commissioners to such persons and shall, unless the Commissioners otherwise direct, be deemed to be part of the costs.

11.—(1) Costs shall be in the discretion of the Commissioners, and the Commissioners shall have full power to determine by and to whom and to what extent such costs are to be paid and to include in their report all necessary recommendations for the purposes aforesaid. The Commissioners may allow interest on costs at a rate not exceeding six per cent. per annum, and such interest shall be added to the costs.

(2) The fees payable by a party in respect of fees of his adversary's pleader shall be such fees as the Commissioners may allow.

12. Any order made by the Governor-General or Governor or Lieutenant-Governor on the report of the Commissioners regarding the costs of the inquiry may be produced before the principal Civil Court of original jurisdiction within the local limits of whose jurisdiction any person directed by such order to pay any sum of money has a place of residence or business, or, where such place is within the local limits of the ordinary original civil jurisdiction of a chartered High Court, before the Court of Small Causes having jurisdiction there, and such Court shall execute such order or cause it to be executed in the same manner and by the same procedure as if it were a decree for the payment of money made by itself in a suit.

13. Any person who has been convicted of an offence under Section 171E or 171F of the Indian Penal Code or has been disqualified from exercising any electoral right, for a period of not less than five years, on account of malpractices in connexion with an election shall be disqualified for five years from the date of such conviction or disqualification from

- (a) being appointed to, or acting in, any judicial office ;
- (b) being elected to any office of any local authority when the appointment to such office is by election, or holding or exercising any such office to which no salary is attached ;
- (c) being elected or sitting or voting as a member of any local authority ; or
- (d) being appointed or acting as a trustee of a public trust :

Provided that the Governor-General, in the case of an election to the Council of State or the Legislative Assembly, and the Governor or the Lieutenant-Governor, in the case of an election to his Legislative Council, may exempt any such person from such disqualification.

14.—(1) Every officer, clerk, agent, or other person who performs any duties in connexion with the recording or counting of votes at an election shall maintain and aid in maintaining the secrecy of the voting, and shall not (except for some purpose authorized by or under any law) communicate to any person any information calculated to violate such secrecy.

(2) Any person who wilfully acts in contravention of the provisions of this section shall be punished with imprisonment of either description for a term not exceeding three months or with fine, or with both.

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